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FORMS
OF
INSTRUCTIONS TO JURIES
— AND —
JUDGMENT ENTRIES

COVERING CIVIL AND CRIMINAL
CASES IN ALL COURTS OF
RECORD IN OHIO

By EDGAR B. KINKEAD

(OF THE COLUMBUS BAR)

AUTHOR OF "CODE PLEADING"

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PREFACE.

IN the preparation of this volume an earnest endeavor has been made to follow and carry out suggestions made to the author, and it is hoped that the expectations of friends of the enterprise may be realized, and that it may prove useful to bench and bar. The Forms of Instructions have been gathered from the reports, records of unreported cases in the Supreme Court, and from instructions given by various trial judges in cases which have not all been reviewed by the higher courts. Some have been taken from other states, and others have been prepared by the author to make the compilation more complete. The effort has been to select only such charges as have been directly approved, or those which will prove reliable under test. The kind assistance of the various judges who have aided in the work, as well as the words of encouragement offered by others, will always be cherished.

I have endeavored to make the Judgment Entries as full and complete as possible, covering all courts of record in the state. Forms are only suggestive guides to be followed with judgment and discretion, and when so used serve a useful purpose. My associate, Wellington L. Merwine, has rendered valuable assistance in the compilation of the Judgment Entries.

EDGAR B. KINKEAD.

Columbus, Ohio, June, 1897.

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FORMS

OF

INSTRUCTIONS TO JURIES.

PROVINCE OF COURT AND JURY.

No. 1. Relations of court, jury, and attorney—Instruction as to zeal of counsel.—For fear that the heated, over-weening zeal of counsel may tend to lead some of you away from the dignity and importance of a judicial trial, and your positions and duties as jurors, you are admonished that you should not by any means be mislead from the calm, staid, intelligent, impartial consideration of the matter submitted to you. The discharge of your duties is a matter of very grave moment, not only to the parties to the suit, but to the public welfare. The amount involved is of great consequence to the parties, but the righteousness of the proceedings of this court is of much greater importance.

The duties of the court and yourselves are decidedly different from those of the attorneys, who frequently in their zeal, on the spur of the moment, go beyond what they would approve in their deliberate moments.

It is one of the fundamental maxims of our profession, that the lawyer must be true to his client, loyal to his every interest, and that he must permit no stone to be unturned in his efforts to see that the right of his client is properly vindicated, and if some do exercise more zeal than judgment, a zeal that never ought to affect you, and never ought to affect the court. Your duty is to determine from the evidence in the case, what the facts are and where the rights of the parties lie, irrespective of party, without fear, feeling, or favor. Both parties to this contention and the public look to

you, gentlemen, to discharge your duty in a dignified, self-respecting manner, to discharge it so that confidence may be properly reposed in your final determination of the issues submitted to you; and that the dignity and righteousness of the administration of public justice by the court be exalted, and loyally be upheld by you. The court as the representative of the law desires that you should enter upon your deliberations and discharge your duties in that spirit, and only in that spirit.

Voris, J., in *Quinn v. Ewart*, Summit Co. Com. Pleas.

No. 2. Introductory in criminal case—Province of jury to ascertain truth—Province of court—Of attorneys.—You have heard the evidence offered before you on both sides of the case. From that evidence you learn what the facts are; you extract the truths of the case. That is your province. But you are not able by those facts, those truths, alone, to arrive at a verdict; because there is something else that enters into the verdict, and that is the law that is applicable to the facts, to the truths. These two elements enter into and make up every verdict of a jury. It is from the court, and from no one else, that you receive the law.

It is the express duty of the court—commanded by statute—to charge you as to the law of the case; to inform and instruct you what are the elements of the crime of which the prisoner is accused; what is the measure or quantity of the evidence necessary to convict him; what evidence is insufficient to convict him; and for what purpose some, or all, of the evidence introduced is to be applied by you; and it is your imperative duty to conform your findings to these instructions.

It is the privilege of the court, in charging you, to sum up the evidence, to review the facts, in order to aid you in the ascertainment of the truth, but not to usurp your province and prerogative; for there is nothing which the court may say that can absolve you from the duty of finding the facts for yourselves.

Therefore, if, in this charge, there should be a review of any of the facts, you will remember that it is not binding on you in the manner that the instructions touching the law are, but that it is only advisory, to aid you; and that you are left with entire freedom, and a perfect obligation resting upon you, to decide the questions of fact for yourselves.

This is a case of unusual magnitude. It is not surprising therefore that the attorneys, in their anxiety and zeal, should have urged upon you some topics and considerations which

have no pertinence to the case, and which should have no influence upon the minds of oath-respecting jurors when they come to determine the case.

The attorneys had a wide range of discussion. They had the fullest freedom of argument before you upon every question of fact, and before the court upon every question of law. It was their privilege to analyze the evidence; to arraign the conduct of the prisoner and O. (the deceased), and all others concerned in the transaction which has been investigated; to characterize and impugn their motives, if the evidence justified it; to assail the credibility of the witnesses who were, either directly or indirectly, impeached; and to give full play to their wit and imagination in the illustration and adornment of their argument. But this does not mean that they had the right to make statements of facts not sustained by the evidence or to urge upon you considerations outside the case.

Open and explicit appeals were made by them to your sympathy, to your commiseration; pathetic allusions were made to the distressed and sorrowing families of those who were concerned in the transaction under investigation.

You must exclude from your minds, promptly, manfully, and absolutely, all impressions and convictions which may have found lodgment there, either consciously or unconsciously, that are not made by the evidence or the law. When you come to the consideration of this case upon its merits, you should not permit the suggestions, allusions, statements, and arguments about the distress and sorrow of the families interested, and about the contents of said articles to have any weight or influence upon your minds. Lay them aside as wholly irrelevant to the issue, which must be considered and determined by you strictly upon the evidence introduced and the law given to you by the court. With the consequences of your verdict you should not be concerned. The evidence, with such reasonable deductions as may properly be drawn therefrom, together with the law of the court's charge, should alone be looked to in reaching your conclusions and in arriving at your verdict.

With the dispensation of mercy you have nothing to do. You are ministers of justice and not of mercy. The administration of mercy is a function that belongs to the Governor of the state, aided by the Board of Pardons.

In a civilized state like this, it is absolutely essential to the preservation of social order that the law should be enforced, and especially in cases where acts of violence have been done. The laws must be obeyed, violators of the law

must be punished; and you as jurors would be faithless to your trust if you should return a verdict of acquittal in this case when the facts demand a conviction of the prisoner.

It is equally important that innocence should not be punished. You were impaneled, not for vengeance, but to subserve the ends of public justice; and you would be disloyal to your obligations if you should find the prisoner guilty when the evidence required his acquittal.

This much has been said to impress you with a sense of the responsibility which you owe to your consciences and oaths, that your verdict should be honest, intelligent, and in conformity to the evidence and the law.

David F. Pugh, Judge, in *State v. Elliott*, Franklin Co. Com. Pleas.

No. 3. Appropriate remarks in the beginning of a charge.—"The court knows of no more important public duty than you are now engaged in. You constitute an indispensable part of the court whose offices are just as important and dignified as those of the judge presiding. The courts thus constitute and are the supreme power that finally determines all litigated contentions, and to whose power all the people and every public officer of the state must yield. Hence you see that the people justly take a deep interest in the determinations of the jury trials. Public confidence is strengthened or shaken as the jurors discharge intelligently or loosely their duties. I make these suggestions because I want to impress upon your minds that the final duty which you are about to perform is one of very great importance, and one that deeply concerns the public welfare as well as the litigating parties. You have been carefully selected from the citizens of the county because of your special fitness and qualification to discharge these important duties. It is fair to say that the experience of mankind goes to show that the candid, impartial judgment of ten or eleven men is a safer guide than that of one or two, equally candid, intelligent, and impartial men; and, while one or two men may be right in their convictions, yet it is safer for them to consider well the sources of their convictions before they finally decide against the agreement. Yet every juror should feel that it is his duty not to yield a well-grounded conviction because it does not accord with the convictions of his fellow jurors. Both parties to this action are entitled to the independent and best judgment of each juror. A disagreement should not be had when an agreement can be reasonably secured by an impartial, candid, and fair concurrence of the individual judg-

ment of each juror. You may well remember that if this jury disagree, that this contention must be settled finally by a jury of twelve men, in no respect better qualified to try the issue of fact than you are, and upon no better presentation of the case to them. An honest, candid, and independent discussion leads to truth, heated controversy, to disagreement."

By Judge A. C. Voris, Summit Co. Com. Pleas.

No. 4. Another form of opening statement.—Before you enter upon the discharge of your duty in the premises, it is incumbent upon the court to assist you by giving you certain instructions upon the law that it considers applicable to this case. There can be no doubt whatever in your minds as to whether the court is correct or not in its conclusions and instructions respecting the law. It is the duty of the court to instruct you in this respect, and it is your duty to act in accordance with those instructions. If the court should err in its statement of the law, it does not concern you, for there is a remedy provided for reviewing the action of the court by a higher tribunal, and correcting any errors that may have been made. You must, therefore, take the law as given you by the court.

You are the tryers of the facts, and in that respect the court has no supervision over you. The individual judgment of the juror acting candidly is the only guide for him in determining the facts in this case from the evidence. If the court has made any statement of fact resulting, or to be drawn from the testimony, it is an oversight and should not be considered by you. The court has no right or business to intimate to you any conclusion of fact drawn from the testimony that you are to consider, nor have you any right to form an opinion whatever as to what the court may think of the facts, or as to which had the approval in this case. Very frequently jurors will watch very closely to discover, if possible, what may seem to be the vent of the court's mind upon the facts, so as to discover what the court thinks about them. This you must steadily refrain from doing, as it matters not what the court may think about the facts. The law very properly has made twelve men an essential constituent part of the court, whose duty in determining the facts is as important as that of the court trying the case and determining the law applicable to it. And you are to exercise in all your deliberations, judgment of candid, intelligent men, who are anxious only to get at the truth. You should be especially careful that you be guided, in the conclusion to which you come, by

the evidence submitted to you and the instructions of the court and nothing else. The public welfare depends more upon the intelligence and impartiality and just deliberation of the jurors in the cases submitted to them than upon the discharge of any other public duty that falls to your lot. If you discharge your duties well, if you challenge the respect of the community by the justice, intelligence, and impartiality of your decision made, you will command the respect and confidence of the people in our courts. It is of prime consequence that jurors should be grave, that they expect, and, while respecting a sense of public justice, that they exalt the administration, so that neither party shall have any cause to feel that their case has not been impartially and fairly considered.

ACCOMPLICE.

No. 5. Accomplice defined.—An accomplice is one who is in some way concerned in the commission of a crime, though not as a principal; and this includes all persons who have been concerned in its commission, whether they are considered, in strict legal propriety, as principals in the first or second degree, or merely as accessories before or after the fact. (4 Bl. Com. 331.) Or one of many equally concerned in a felony, the term being generally applied to those who are admitted to give evidence against their fellow criminals for the furtherance of justice which might otherwise be eluded.

Cross v. People, 47 Ill. 158.

No. 5a. Accomplice defined—Offering immunity from prosecution.—Under an ancient practice, which is part of the common law of this state, the prosecuting attorney was authorized to promise an accomplice that if he would give his testimony freely and truthfully, without prevarication or fraud, he should be protected from prosecution, “for that or any other previous offense of the same degree.” The prosecuting attorney was vested with the discretion, till the court should interfere and compel him to determine whether or not (naming witness) as an accomplice, should be permitted to turn “state’s evidence,” as it is sometimes phrased; and whether, if he does, he is afterwards entitled to be no further prosecuted. He did not have to be indicted. In an

old authority it is put in this way: "The party that is to be a witness is never indicted, because that doth much weaken and disparage his testimony."

Pugh, Judge, *State v. Abbott, et al.*, Franklin Co. Com. Pleas, 1 Hale, P. C. 305.

See *Allen v. State*, 10 O. S. 287; *Lee v. State*, 21 O. S. 151.

No. 6. Credit to be given testimony of an accomplice.—

The fact that (naming witness) was an accomplice, if that is a fact, did not make him incompetent as a witness; the turpitude of his conduct does not disqualify him to be a witness. The admission of an accomplice as a witness is said to be justified by the necessity of the case, but with the wisdom of the practice you are not concerned.

"The rule is founded on necessity, since, if accomplices were not admitted, it would frequently be impossible to convict the greatest offenders." 2 Hawkins' *Pleas of Crown*, Sec. 94, Ch. 46; 47 Ill. 160.

The degree of credit which ought to be given to the testimony of a witness who has turned state's evidence is a matter exclusively within your province to decide. It has sometimes been said that a jury ought not to believe such a witness' testimony unless it is corroborated by other evidence, and, undoubtedly, great caution in weighing such testimony is dictated by prudence and sound reason. The law expressly concedes, however, that you may, if you see fit, act upon the testimony of an accomplice without any corroboration; but, on the other hand, it seems to be a duty incumbent upon judges to advise the jury not to convict upon the testimony of an accomplice alone, and without corroboration, and it is now so generally the practice to give the jury such advice, that its omission would be regarded as an omission of duty. You are advised not to convict the defendant upon the testimony of (naming witness) unless you find it is corroborated. You are instructed not to give credit to his testimony unless it is confirmed by other evidence, either undisputed or well-established facts or circumstances, or by the testimony of truthful witnesses. The corroborative evidence must tend to confirm the testimony of the accomplice upon a point material to the issue, in the sense that it tends to prove the guilt of the defendant.

Pugh, Judge, in *State v. Abbott*, Franklin Co. Com. Pleas.

Authorities holding that the testimony of an accomplice must be corroborated: *Lowery v. State*, 72 Ga. 649; *State v. Dietz*, 67 Ia. 220; *Anderson v. State*, 20 Tex. App. 312. "The evidence of accomplices in crime should

be very cautiously received, and should in all cases be suspiciously scrutinized by a jury." *Noland v. State*, 19 O. 131, 135. The jury may be charged that the defendant may be found guilty upon the testimony of an accomplice, who is corroborated as to one or more material facts by other reliable evidence. *Brown v. State*, 18 O. S. 497. The degree of credit to be given an accomplice is a matter for the jury. It is highly proper that the jury should require his testimony to be corroborated; but there is no rule of law requiring a jury to refuse to convict upon the uncorroborated testimony of an accomplice. The judges should in their discretion advise the jury not to convict upon such testimony of an accomplice. This is so generally the practice that its omission is regarded as an omission of duty. *Allen v. State*, 10 O. S. 288, 305. See *Bouvier's Dic.* under "Accomplice."

ACCORD AND SATISFACTION—SETTLEMENT AND COMPOSITION.

No. 7. A suit made upon amount due upon bond.—"If the jury believe from the evidence, that the plaintiff and defendant accounted together as to the indebtedness evidenced by the bond sued on, and so accounted freely and without concealment or fraud by either, and that, as a result, the bond was so paid and discharged as that the defendant was then entitled to said bond, then it is not material to inquire into the consideration so paid and accepted in the discharge thereof. But if you believe from the evidence, that the transaction was not so executed, final and conclusive, that the defendant was then and there entitled of right to said bond, then all pretended payments claimed which are shown to have been paid in confederate money, or other illegal or unlawful currency, are null and void, and should be totally disregarded by the jury."

From *Washington v. Burnett*, 4 W. Va. 84-5.

No. 8. Settlement of action for damages—Client may compromise without consent of attorney.—If you have found upon these propositions in favor of the plaintiff, then you will proceed to inquire and determine the other question made by the pleadings in the case. That is, as to whether or not a settlement, adjustment or compromise of this matter was made, between the plaintiff and defendant as alleged in the supplemental answer of defendant, and upon this question, I say to you as a matter of law, that the plaintiff in this action had a right to settle, adjust and compromise the action which had then been commenced without the counsel, advice or consent of his attorney, and without reference to the views

or wishes of J., his then attorney, in regard to the same. In order to constitute a valid settlement, it must have been understood between the parties at the time it was made, that is, their minds must have met upon the proposition which was made with reference to a settlement on the one hand and the acceptance thereof by the other. The plaintiff claims that no such settlement was made, and it is a question of fact that is submitted to you for your consideration. Look over all the testimony in the case, if you find a settlement was made as claimed by the defendant, and that the same was complied with upon their part, then you need inquire no further, but should return a verdict for the defendant. But if on the other hand, you find that a settlement was not thus made, but was brought about as is claimed by the plaintiff, by fraud practiced upon him, and by reason of false representation made to him at the time, and that he was induced by reason of the fraud thus practiced, and representations thus made, to enter into an arrangement, agreement and settlement which was then made, if you find one to have been made, this would not constitute a settlement between the parties, and upon this proposition you should find for the plaintiff.

The burden of proof upon the question of settlement is upon the defendant, but so far as the introduction of the paper writing by the defendant is concerned, or the paper purporting to have been executed and signed by him, it would be *prima facie* evidence of the making of such settlement, that is, if you find that he signed the paper-writing that is offered in evidence, and in determining the question as to whether or not fraud was practiced upon him, upon that question, the burden of proof would rest upon the plaintiff, and you must remember that fraud is not to be presumed—it must be shown and established by a preponderance of the evidence upon the part of the plaintiff, proven as any other fact in the case.

From Pennsylvania Co. v. Lombardo, 49 O. S. 1.

No. 9. Accord or compromise by creditor with debtor.

—It is claimed by the defendant that there was made what is called a composition of the debt at the time the payment of 87½ percent was made on it, and that he is thereby discharged of the balance.

“Where several creditors, with the knowledge of each other, agree on the faith of each other undertaking to give time to, or accept a composition or percent from a debtor,

in discharge of his debts, the agreement will be binding on all the creditors who are parties to it."

If the plaintiff, with the knowledge of other creditors, agreed with the other on the faith of each other's undertaking, to accept $87\frac{1}{2}$ percent of the debt in discharge of the whole debt, the agreement so made is binding, and discharges F. from the balance. But it is for the defendant to prove, by a preponderance of the evidence, that such a composition and agreement to discharge the defendant, F., from the balance was made by creditors, to which the plaintiff was a party.

As to the matter of an accord or compromise, by an individual creditor with his debtor, by which it may be agreed to accept a part, in satisfaction of the whole, discussed by counsel: In order to constitute a defense for the defendant, on that ground, in this case, the defendant must prove, by a preponderance of the evidence,

First: That such an agreement to receive a part in satisfaction of the whole debt was made between the plaintiff and defendant, or by parties authorized to and for them in the matter.

Second: That there was a consideration for such agreement. The payment in part only, as $87\frac{1}{2}$ percent of the amount at the time due, is not such a consideration. The verbal promise of said McC. to pay the balance on December 1, or other named time, if made, was not such a consideration.

The payment of the account in said bank to the credit of the account then kept in the said name, "M. F. Special," to the parties then holding checks in said bank, signed "M. F. Special," pro rata, if done, was not such a consideration.

There must be some benefit or advantage derived by the plaintiff from the agreement, other than the payment of a part only of what is due him, to constitute a sufficient consideration. (For example, Swan's Tr. 323.)

"The payment of a less sum than is due before a debt is due; or payment of a less sum at another place than is stipulated, in satisfaction of the whole debt; or the acceptance of security for a part of the debt, in consideration of which the creditor agrees to lose the balance; or an agreement to receive a part of the debt in money and the residue in specific articles: in all these cases the creditor derives a benefit from the arrangement, and there is therefore sufficient consideration."

Martin Frey, Plaintiff in Error, v. G. W. Gragg, Defendant in Error, S. C.

ACCOUNT.

No. 10. Account—Note given for an open account—Effect—As a defense when suit brought upon the account because notes not due.—When a note is given for an open account, it does not distinguish or discharge the account unless such is the express agreement of the parties, and the burden of showing such an agreement is upon the debtor. In the absence of such agreement, the acceptance of a note merely extends the time for the payment of the debt; and if the note is not paid when due, suit can then be brought either upon the note or on the account; and, further, if for any reason the contract extending the time for the payment of the debt is lawfully annulled or rescinded before the note matured, then suit may be brought upon the account at once, and if the plaintiff in this case had a legal right to disregard the notes and sue upon the account, it was not necessary for the plaintiff to return the notes before the suit, but the law would be satisfied if they returned the notes at any time up to the day of the trial.

Samuel F. Hunt, Judge, in *Belford, Clarke & Co. v. The H.-A. Lith. Co.* Affirmed. Supreme Court, No. 2,662, Hamilton County.

AGENCY.

No. 11. What constitutes an agent.—You are instructed that an agent is one who acts for another by the authority of the principal, one who is entrusted with the concerns of another, and whatever he does as such agent, within the scope of the authority conferred on him by the principal, is as much the act of the principal as if done by the principal himself. In such case his acts are the acts of the principal.

No. 12. Ratification of agency.—The prior appointment of, or the subsequent ratification of the acts of a third person as agent, will confirm and establish the authority of the agent, and generally, if the party receives and holds the proceeds of the beneficial results of the contract, with knowledge of the material facts, he will not be permitted to deny the authority of the agent, for it is in fact the ratification of the contract.

The member can not in general adopt a part and disavow a part of the contract of the person who proposes to be his agent. This should be received, however, with the qualification that the member must have knowledge of the material facts to bind him.

Voris, J., in *Valley Railroad Company v. The Thomas Lumber and Building Co.*, Summit Co. Com. Pl. Affirmed by Circuit Court.

Ratification is a question of fact for the jury. *Middleton v. R. R. Co.*, 62 Mo. 579; *Fisher v. Stephens*, 16 Ill. 397: A principal can not adopt part without adopting the whole. *Winpenny v. French*, 18 O. S. 469; 34 O. S. 450. Full knowledge is necessary. *Wilson v. Forder*, 20 O. S. 89, 97. It will not be implied from acts done in ignorance. *Grant v. Ludlow*, 8 O. S. 1, 19; 24 O. S. 67.

No. 13. Agent—Right to recover where double agency known to principals.—If the defendant employed the plaintiff to act as his agent in the exchange of property mentioned in the petition for a farm owned by another, or employed him to aid and assist in such exchange, and agreed to pay him a certain percent as commission on the property, and at the same time knew that the plaintiff was the agent of the owner of the farm which defendant was seeking to obtain, and that plaintiff was acting as the agent of said owner, and the defendant assented thereto and agreed to pay the commission, and the owner of the farm knew that plaintiff was acting as agent of the defendant in the exchange, and assented thereto, agreeing to pay the plaintiff the commission stipulated in the written contract of agency, the plaintiff is entitled to recover.

From *Bell v. McConnell*, 37 O. S. 396.

AIDER AND ABETTOR.

No. 14. Homicide — Aider and abettor when present without knowledge.—“It is not sufficient to establish the guilt of a defendant in aiding and abetting the principal in the commission of the homicide charged in the indictment, that he was present with others where the alleged killing was done, for he may have been present not knowing that any crime was about to be committed; and if he was not there in furtherance of an understanding or common purpose to commit some unlawful act, and was in company with the principal without knowledge that the commission of an offense was contemplated by the principal or any of his co-defendants,

he is not responsible for the acts of the principal or his other co-defendants if he, the defendant, did not participate in the commission of the crime charged."

From *Goins v. State*, 46 O. S. 457.

No. 15. To constitute an aider and abettor—There must have been previous conspiracy or an overt act.—In the absence of a conspiracy, one who is present when a homicide is committed by another upon a sudden quarrel, or in the heat of passion, is not guilty of aiding and abetting the homicide, although he may have become involved in an independent fight with others of the party of the deceased, unless he does some overt act with a view to produce that result, or purposely incites or encourages the principal to do the act; and so in this case, if you find the defendant on trial, although present at the time of the shooting, knew nothing of his son H. having a revolver, or intending to shoot, and took no part in the killing, and done no overt act to produce that result, then he is in no way responsible, and must be acquitted, unless you find from the evidence, and beyond a reasonable doubt, that the shot was fired by H. in pursuance of a conspiracy previously formed by them.

Approved in *Woolweaver v. State*, 50 O. S. 277, 287.

No. 16. Aider and abettor—a full charge in homicide.—It is one of the fundamental, as it is one of the most familiar, principles of criminal law, that when a criminal act is done by one of two accused persons, as, for instance, shooting and taking the life of a third person, and the other accused person is present when the criminal act is done, and by words, acts or gestures, aids, assists and encourages the other to do the criminal act, then both are responsible and guilty as principals; and that is true, notwithstanding the fact may be that a previous conspiracy had not, by them, been formed to kill the person who was then killed.

To constitute one who is present, and who becomes involved in a fight, which results in death of the antagonist, an aider and abettor, it should appear either that there was a prior conspiracy, or *that he purposely incited or encouraged the slayer, or did some overt act himself, with intent to cause the death of his antagonist*. *Woolweaver v. State*, 50 O. S. 277.

The charge as we have given, might be modified to comply with the decision just quoted; although the remainder, is a compliance with the rule. See No. 15 for a direct charge upon this point

And it is also true, notwithstanding the two accused persons lawfully came together at the time and place of the shooting. The fact that they lawfully came together, then and there, could not, in law, diminish or mitigate the criminality of the shooting, if it was criminal, which was afterwards done. According to old definitions, he who actually commits or takes part in the actual commission of a crime, is a principal of the first degree, and he who aids or abets the actual commission of the crime is a principal of the second degree. Since our statute, which places both of these classes in the same category, was passed, the old definitions are of no practical use except to explain the meaning of terms used. The reason of this law making both of the persons named guilty is that the will of the accused person, who did not do the shooting, contributed to the result produced by the shooting, the death of the person shot. His guilt, therefore, is the same as if he himself did the criminal act. The revolver, or pistol, or gun out of which the fatal shot was fired, was the pistol, or revolver, or gun of both of them, although only one of them owned, held and directed it when it was fired.

To render the accused person who simply gives aid and encouragement, but did not do the criminal act, responsible and guilty, it is not necessary that he should have been strictly, actually, and immediately present when and where the shooting was done, in the sense that he was an eye or ear witness to what passed.

Warden v. State, 24 O. S. 143.

If he was sufficiently near to give the aid and encouragement and help to the other, that was enough. His mere presence, however, was not sufficient to make him an accomplice. He must have done something more. He must have incited, or assisted, or encouraged the other person to do the criminal act in one of the ways mentioned. In this instruction the court has only elaborated and expounded to you a statute of the State of Ohio, which declared: 'Whoever aids, or abets, or procures another to commit any offense, may be prosecuted and punished as if he were a principal offender.'

D. F. Pugh, Judge, in State v. Elliot, Franklin County.

ALIENATION OF AFFECTION.

No. 17. Alienation of affection of wife.—In his petition plaintiff claims that he had the confidence and affection of his wife up to the time of the wrongful acts and conduct of this defendant; and he claims that the defendant alienated, destroyed and won away from him these affections and confidence that his wife had for him and that he enjoyed.

I may say to you that the affections and the confidence of a man's wife are something of value and for the loss of which the law gives the right to recover. The burden, however, is upon the plaintiff and he must show by a preponderance of the evidence that the defendant did alienate, destroy and win away from him that affection and confidence she had for him; and if he fails to show by the evidence he can not recover and you should find for the defendant. This question, as I have indicated, is purely one of fact about which these parties are earnestly and seriously contending.

The plaintiff insists that by the evidence he has produced in court as he had shown, in the way that the law requires he must show before he can recover—that is, by a preponderance of the evidence—that this defendant did, as alleged in his petition and as claimed by him, alienate the affections of his wife. On the contrary, this defendant just as seriously and earnestly denies and contends that the plaintiff not only has not shown as required, and as the court has instructed you he must, but in fact, he has utterly failed in establishing the averments in this particular as claimed. The acts by which it is claimed the affections of plaintiff's were alienated must have been unlawful in and of themselves; they must have also caused plaintiff's wife to be unfaithful in her marital obligation to him.

Gillmer, J., in *John Cottle v. Samuel Kellogg*, Trumbull County C. P. See *Winstake case*, 34 O. S. 621; 24 W. L. B. 121; *Cooley on Torts*, 262, (224), 263, 264.

No. 18. Same continued.—Defense that husband mistreated wife.—It is claimed by the defendant that he has produced evidence tending to show that the plaintiff drove his wife away from him on account of his cruel treatment of her. This evidence, gentlemen, if true, would not be a defense in the action, provided that you find that the defendant

did alienate the affections of plaintiff's wife; but it is evidence that you should take into consideration, if you come to that question, in mitigation of any damages that you think the plaintiff has sustained. It was introduced for that purpose, and for that purpose should be considered by you, and by way of rebutting the claim of the plaintiff that his wife's affections were alienated by the defendant. It is the claim of the defendant that this plaintiff drove his wife away on account of his cruel acts towards her; drove her from his house and home, and that this was the reason and on that account she left and not by reason of any acts or conduct of his that caused her to separate from him.

Gillmer, J., in *Cottle v. Kellogg*, Trumbull County C. P. The bad character of the husband will not mitigate damages, unless he is guilty of unchastity or other wrong to the wife. *Norton v. Warner*, 9 Conn. 172.

No. 19. Measure of damages.—If, under these instructions, however, you find the issues joined for the plaintiff, then your next inquiry will be as to the measure of damages this plaintiff has sustained on account of the wrongful acts of this defendant, alleged in his petition, by which he lost the affection and confidence of his wife. This will include not only the loss of the wife's affections, but for the comfort of the wife's society. If you shall find that the defendant seduced the plaintiff's wife, then you should include also dishonor of the marriage-bed; the mortification and sense of shame produced to the husband through the knowledge and results of such seduction, and also loss of the wife's services if she separated from her husband through such seduction.

It is difficult to lay down any precise rule for you to ascertain or measure the amount of compensation or damages that the plaintiff would be entitled to, provided that you find for the plaintiff.

The jury should, however, exercise their own judgment and common sense in determining what amount of damages, if any, would be a fair compensation to the plaintiff for whatever injury they may find from the evidence he has suffered on account of the wrongful acts alleged and averred in his petition.

Gillmer, J., in *Cottle v. Kellogg*. See 2 Addison on Torts, 762 (591), 764; *Matheis v. Mazet*, 164 Pa. St. 580.

No. 20. Alienation of affections.—Another charge.—There are a few propositions which it will be important for

you to consider and determine, to some of which I will now direct your attention. In considering the case, you can take the matters up in the order which I use, or in some other order that shall seem best to you. 1st. Are the plaintiff and his wife living separate and apart from each other? 2d. If they are living separate and apart from each other, did the defendant cause such separation? 3d. Did the defendant have sexual intercourse with the plaintiff's wife? 4th. Was the defendant at the time of the commencement of this action living with plaintiff's wife in adulterous intercourse? 5th. If you find from the evidence that the defendant caused the separation between plaintiff and his wife, or was guilty of any of the acts of adultery charged in the petition, was the plaintiff damaged thereby? 6th. If you find from the evidence that the plaintiff has been damaged by said acts of the defendant, what is the amount of plaintiff's damages, caused by defendant's acts? Now, gentlemen of the jury, the plaintiff claims that there is a separation of the plaintiff and his wife, caused by the conduct and acts of the defendant. Plaintiff claims that the defendant has enticed the plaintiff's wife away from him, and alienated her affections from the plaintiff; and that the conduct of the defendant caused the separation of plaintiff and his wife. On the other hand, the defendant claims that, if there is a separation between the plaintiff and his wife, it was caused by the ill treatment of the plaintiff towards his wife, and the other acts of the plaintiff towards his wife. The defendant denies that he has enticed the plaintiff's wife away from him, or alienated her affections from the plaintiff, or in any manner caused their separation. If, therefore, you find from the evidence that the plaintiff and his wife have separated from each other, it will be important for you to determine from the evidence the cause of separation of said parties. Did they separate on account of the acts and conduct of the *defendant* or from some other cause? And in determining the cause of the separation it would be proper for you to look to and consider the conduct and acts of the parties and their families, their relations to each other, the conduct of the defendant towards the plaintiff's wife and family, and the conduct and treatment of the plaintiff towards his own wife and family, and his general treatment of them, and the time when and manner in which the plaintiff left his family, if he left them. These facts in connection with all the other evidence in the case should be considered by you.

It is important for you to carefully consider all the facts and circumstances surrounding these parties, and from all

the evidence given you in the case determine whether the plaintiff and his wife separated and remained apart on account of the acts and conduct of the defendant, S., or from some other cause.

It is a question for your careful consideration and determination from all the facts and circumstances of this particular case, as shown by the evidence given you on the trial.

It is not incumbent upon the defendant to show the cause of the separation, nor that it was caused by the misconduct of the plaintiff. If the defendant did not cause the separation, nor prevent the wife from going back to her husband, nor have sexual intercourse with plaintiff's wife, then the defendant would not be liable in this case.

Nye, J., in *Wagoner v. Shaw*, Medina C. P. It is not necessary that the wife should have been seduced. An action lies for alienation of affections merely.

No. 21. Same continued—Burden and character of proof of adultery.—Now, gentlemen, you have listened to the evidence in this case patiently, and the question as to whether the defendant has had sexual intercourse with the plaintiff's wife at any time is for your determination, after due consideration of all the facts and circumstances of this case, as shown by the evidence. The burden is upon the plaintiff to prove said acts by a preponderance of the evidence. If he has failed to establish that fact by the weight of the evidence, then your decision on that point should be against the plaintiff. It is not claimed on the part of plaintiff that he has produced any witness who has testified to seeing any act of adultery between the defendant and plaintiff's wife, but the plaintiff claims that he has shown such facts and circumstances as will warrant the conclusion that adultery was committed. The burden is upon the plaintiff to show such a state of facts as will satisfy you of their truth by a preponderance of the evidence.

Nye, J., in *Wagner v. Shaw*, Medina Co. Com. Pl.

No. 22. Same continued —Character of evidence.—The author gives this as a charge which he believes to be a proper statement of the rule of evidence governing this matter:

The jury are instructed that in cases of this kind, where an illegal act is charged or involved in the civil suit, the same rules of evidence generally applicable in civil suits prevail, as against those which should be followed if you were investigating the criminal charge involved in a criminal case. Adultery is made a crime by our laws, and if you were trying that issue under an indictment, you would be required to find the defendant guilty thereof beyond a reasonable doubt. Not so in a civil proceeding as here, where it is charged, as in this case, that the defendant has committed adultery with the wife of the plaintiff, you are not required to be satisfied for the purposes of this suit beyond a reasonable doubt, that the defendant has been guilty of adultery with the wife of the plaintiff, that you are only to look to all the evidence, and if you believe and are satisfied from a preponderance of the evidence that the defendant committed adultery with plaintiff's wife, then upon that point, as one of the facts in this case, you may find for the plaintiff.

There certainly can be no doubt but that the rule that the doctrine of reasonable doubt of criminal cases does not apply to civil issues. The great weight of authority and the better view is that in civil issues the result should follow the preponderance of evidence, even though the result imputes the crime. This rule has been adopted in Ohio. *Lyon v. Fleahmann*, 34 O. S. 151; *Shaul v. Norman*, 34 O. S. 157; *Jones v. Greaves*, 26 O. S. 2. This is at least the case in all cases aside from those enormous crimes, *Id.* See fully opinion in 34 O. S. 151-156, and authorities cited. It is treated very fully in Wharton's Ev. Sec. 1246; 1 Greenleaf's Ev. Sec. 13a, note.

No. 23. Same continued—Proof adultery.—The jury are instructed that it is not essential that sexual intercourse be proved by direct testimony; that circumstantial evidence is legal and competent, and if it is of such a character as to satisfy you of the adulterous relations existing between defendant and Mrs. W., it is entitled to the same weight as direct testimony. What is meant by circumstantial evidence is the proof of such facts and circumstances connected with or surrounding the commission of the acts charged as tend to show the guilt or innocence of the parties charged. It is not necessary to prove by direct testimony the fact of adultery,

but to warrant the jury in finding the defendant and Mrs. W. were guilty of adultery the circumstances ought to be such as would lead a careful and guarded man to the conclusion that the act of adultery had been committed. The jury ought to be satisfied from the evidence given in the case, that the parties to said alleged adulterous act had the opportunity of committing the act, and also that they were of a disposition and had the inclination to commit the act of sexual intercourse. The mere fact that the defendant and Mrs. W. had the opportunity of committing adultery would not be sufficient of itself to prove adultery without any disposition or inclination on the part of the parties to said act. In considering this branch of the case it would be proper for you to consider the character of the defendant and of Mrs. W., and determine whether they or either of them are persons of a character or inclination to commit the acts of sexual intercourse, or adultery, with each other. Has the plaintiff shown such facts and circumstances as will warrant you in finding that they have been guilty of acts of adultery with each other? This is a question for your careful consideration and determination from all the facts and circumstances which have been given you in the evidence in this case.

Nye, J., in *Wagoner v. Shaw*, Medina Co. C. P. See Wharton's Law Ev., Secs. 225, 415, 1246. This is a decided departure from the old view, but is in entire harmony with Ohio decisions, ante, No. 22, note. In this country, the limitation that uncorroborated testimony as to adultery in divorce cases is insufficient has never been accepted. See fully Wharton's Cr. Ev., Sec. 389.

ANIMALS.

No. 24. Scienter—Proof of.—"To enable the plaintiff to recover he must prove that the dog was accustomed to bite mankind, and that it must also be proved that the defendant had knowledge that he was so accustomed to bite; that if a single instance of biting mankind previous to the act complained of in the declaration was fully and satisfactorily proved to the jury and a knowledge of such act on the part of the defendant was proved in like manner, that had been held sufficient to warrant a jury in finding a verdict for the

plaintiff in cases of this kind; but that the force of such testimony would depend much upon the circumstances attending the transaction, as, whether they indicated a disposition to bite without provocation, or the contrary."

Arnold v. Norton, 25 Conn. 92. Thompson on Trials, Sec. 1493. The Statute in Ohio which abrogated the common law rule (13 O. S. 485) has since been repealed.

No. 25. Owner of domestic animal liable for any injury committed by it when.—The owner of a domestic animal is not in general liable for an injury committed by such animal while in a place where it rightfully may be, unless it be shown that the animal was vicious, and that the owner has knowledge of such vicious propensity. But if the animal breaks into the close of another, and there damages the real and personal property of the one in possession, the owner of the trespassing animal is liable without reference to whether such propensity was known to the owner.

Morgan v. Hudnell, 52 O. S. 552.

If the defendant's horse was at the time trespassing in plaintiff's field, on plaintiff's land, or on the land of a third party where plaintiff was pasturing his horse by the month, for a consideration paid by plaintiff to such owner, and there attacked and killed plaintiff's horse, defendant is liable for the injury, whether he knew or not of the vicious propensity of his horse.

If the jury find that the defendant's horse was in pasture on his wife's premises, and while there broke over her part of the partition fence, separating her said lands from the field in which plaintiff's horse was being rightfully pastured by him, then the defendant's horse was unlawfully in the place where the plaintiff's horse was on pasture, and, in such case, if the jury find that he killed plaintiff's horse, the defendant is liable to plaintiff for the injury, whether his horse was in fact vicious or not, and whether he knew of such viciousness or not.

Given by Wm. E. Evans, Judge, in Morgan v. Hudnell, Ross County, and approved in 52 O. S. 552.

No. 26. Permitting ferocious dog to be at large—When at large—Knowledge of ferocious character—What amounts to keeping.—"A ferocious dog, known to the keeper to be accustomed to bite mankind, is to be regarded as at large, within the common import of those terms, when he is so free

from restraint as to be liable to do mischief to man, and this, such a dog is always liable to do when not physically restrained. You will, therefore, determine from the evidence whether or not the defendant properly restrained the dog in question as the keeper of a vicious and ferocious dog is bound to keep it from doing injury at his peril."

If you find from the evidence that the dog in question was vicious and ferocious, and known as such to the defendant, and you further find that the defendant was the head of her family, having possession and control of a house or premises, and she suffered or permitted the dog to be kept on her said premises, in the way such domestic animals are usually kept—as a member of the family, so to speak (in so far as a house-dog may be termed a member of one's family)—such head of a family, the defendant herein, is to be regarded the keeper and harbinger of such dog, and it makes no difference whether the defendant was the owner of the dog or not."

Given by Gilbert Harmon, Judge, by request in *O'Farrell v. Alberty*, S. C. No. 3291, Lucas County. Charge affirmed by Circuit and settled and dismissed in Supreme Court.

One who knowingly and wrongfully suffers a ferocious dog to go freely about his premises where he is also fed and housed is liable for injuries done by such dog, regardless of the question of ownership. *Frammel v. Little*, 16 Ind. 251; *Cummings v. Riley*, 52 N. H. 368; *Marsh v. Jones*, 21 Vt. 378; *Meibus v. Dodge*, 38 Wis. 300; *Barrett v. Madden & M. R. R. Co.*, 3 Allen (Mass.) 101; *3 Loomis v. Terry*, 17 Wend. 496; See *Nordeck v. Loeffler*, 2 W. L. B. 258.

Ownership is sometimes implied by mere possession, and so, likewise, it is presumed that the owner of the dog is the person who keeps or harbors it. And the ownership may be shown as a circumstance indicative of the keeping of the animal. 2 Sh. & Red. on Neg. Part 7:—Chap. XXX, § 626—636; *Buddington v. Shearer*, 20 Pick. 477; *Grant v. Ricker*, 74 Maine 487; *Dickson v. McCoy*, 39 N. Y. 400; *Sullivan v. Scripture*, 3 Allen (Mass.) 564; *Smith v. Jaques*, 6 Conn. 580; *Oakes v. Spaulding*, 40 Verm. 347.

No. 27. Injury from dog continued—Defense—Fastening dog—Giving warning, etc.—The defendant may show in her defense that this dog was properly secured there upon the premises, was secured so that he could not come at anyone to commit any damage, and in that connection you must find as to the relations of the plaintiff there to the defendant and her premises: If the plaintiff was there at work on the premises with Mrs. O's knowledge and consent, then he would have a right to go about the premises in a reasonable way, to carry out and dispatch the business that he was employed to do; and if, in going about in that way, he was bitten by a dog, then he would have a right to recover; though, if you find, as I have already said, that this dog was properly secured, was kept there securely shut up by the defendant, or with her knowledge, knowing that it was so kept so that he

could not come at anybody, and if Mr. A., the plaintiff, was told not to go there, and he understood that the dog was there, and knew that it was dangerous to go there—knew why he was forbidden to go there and understood it—then, if he went where the dog was securely shut up and kept safely—knowing that he was dangerous—if that is shown and made out by the evidence—by a preponderance of evidence—then the plaintiff can not recover.

Gilbert Harmon, Judge, in *O'Farrell v. Alberty*, S. C. No. 3,291, Lucas County.

No. 28. Same continued—As to vicious character.—

Then you should go further and inquire as to what the character of this dog was; look into the evidence on that point and determine and find if he was a vicious, ferocious dog and dangerous to men, women, or children—accustomed to bite mankind; see if the plaintiff has proved that fact; it is necessary for the plaintiff to prove that by a preponderance of evidence before he can recover. If you find that, then go further and inquire whether, before this time, April 12, 1890, Mrs. O. knew of that disposition of the dog—knew that this dog was accustomed to bite mankind—knew that he was vicious, dangerous, and ferocious, or either, or, in other words, that he was accustomed to bite men. If she knew that, why then, on that point, you must go still further and find and inquire whether the plaintiff was bitten by that dog; has he proved it by a preponderance of all the evidence in the case.

Gilbert Harmon, Judge, in *O'Farrell v. Alberty*, S. C. No. 3291. Approved by Circuit Court, settled in Supreme Court, Lucas County.

No. 29. Same continued—As to ownership of dog.—

Now look into the evidence as to whether M. O. kept this dog, and I say to you, gentlemen, that it is not necessary, in order that she can be held to be the keeper of the dog, that she was the owner. The petition does not allege that she was the owner, and it is not necessary to be proved that she was the owner; if she kept and harbored that dog, that is sufficient on that point; and upon that you will look into the evidence and consider it. If you find it to be shown that she was the owner of the premises where the dog was kept—that she had control there, was, as far as that family was concerned, at the head, the head of the family—controlled the premises and had a right to say and did say what was to be kept there, and what should be, and if she, knowing that the dog was there, staying there, and had been for a long time, permitted

her son to take—allowed the dog to be and remain there, then she was, so far as this case is concerned, the keeper of the dog, on that point.

Gilbert Harmon, Judge, in *O'Farrell v. Alberty*, S. C. No. 3291. See cases ante, p. 22, note. But see *Nordeck v. Loeffler*, 2 W. L. B. 258.

ARREST.

No. 30. Arrest without warrant—Duty of village marshal.—"Under the laws of Ohio, the marshal of a village is bound to arrest any person in the act of committing any offense against the laws of the state, and forthwith bring such person before the mayor, or other competent authority, for examination or trial.

"If the person arrested is, as a matter of fact, in the act of committing such offense at the time of the arrest, and the officer has information or knowledge which induces him to reasonably believe, and at the time of the arrest he does believe, that such offense is being committed, and the arrest is made on that account, it is sufficient to justify the arrest without warrant."

From *Ballard v. State*, 43 O. S. 340.

No. 31. Arrest by policeman—What force may be used.—"If the defendant was a policeman of the town, as he insists he was, the law clothed him with the same authority to make arrests within the town as is vested in a sheriff, and if he could have kept B. in custody and prevented deceased from rescuing him without striking, it was his duty to do so. Were there bystanders? If so, he had authority to call them to his aid, and if by doing so he could have avoided striking the deceased, he should have done so, and if he failed to do so, he was not justified in striking the deceased, and it will be your duty to return a verdict of guilty; but if the situation was such that he could not reasonably and conveniently procure assistance, then he had a right to use such force as was necessary under the circumstances to secure B., and if, in the due exercise of that right, he struck deceased, he was justified."

State v. Bland, 97 N. C. 441. "The law does not clothe a police officer with authority to judge arbitrarily of the necessity of killing a prisoner to secure him, or of killing a person to prevent rescue, and it must be left to the jury to pass on the necessity for such killing." *Id.*

ASSAULT AND BATTERY.

No. 32. Assault and battery defined.—Any unlawful beating or other wrongful physical violence or constraint inflicted on a human being, without his consent, is an assault and battery.

If a person only so much as lay his finger upon another, without his consent, in a rude, angry, insulting, or indecent manner, he commits an assault and battery.

But gently touching or laying the hand upon another in a friendly way, without any harmful or evil intent, is not an assault and battery.

If two neighbors meet and shake hands, no assault and battery is committed.

If one friend steps up and lays his hand gently on the shoulder of another, with the intention of speaking with him or for some other proper purpose, no offense would be committed, but such an act as this might be an offense even though done without any feeling of anger. If instead of laying the hand gently on the shoulder, a great degree of violence were used, so as to cause physical pain, the rudeness of the act might render the party doing it liable either civilly or criminally for assault and battery.

James E. Hawes, Judge, in *Harper v. Hart*, S. C. 1500. Assault defined in *Fox v. State*, 34 O. S. 377.

No. 33. The effect of conviction in criminal prosecution upon civil suit.—The fact that the defendant has been convicted and fined for the assault and battery is not a bar to the right of the plaintiff to recover compensatory damages for any injuries you may find he sustained. Before adding any sum to your verdict by way of punishment and example, if you find the same to be evident under our instructions to you, it will be well for you to consider the punishment, fine, and cost adjudged against the defendant in the criminal prosecution, but this evidence can be considered under no circumstances for the purpose of lessening the compensation of the plaintiff for the injuries actually sustained, but may be only for the purpose of aiding you in determining whether any other sum, and if any, how much, should be added by way of punishment and example in addition to that awarded in the criminal prosecution.

Voris, J., in *Otto v. Mills*, Summit Co. Com. Pleas. A civil remedy for damages for injury is not merged in an indictment for the same act. 4 O. 376; 19 O. S. 462, 5 W. L. J. 359.

No. 34. Civil action for damages—Self-defense.—Now I say to you that if you find from the evidence that the defendant committed an assault and battery upon the plaintiff, without any just cause or provocation, the defendant would be liable in this action.

The act of assault and battery may be justified by evidence that it was done in self-defense. One man may protect his person from assault and injury by opposing force to force. Nor is he obliged to wait until he is struck; for, if the weapon be lifted in order to strike, or the danger of any other personal violence be imminent, the party in such imminent danger may protect himself by striking the first blow and disarming his assailant. But the opposing force or measure of defense must not be unreasonably disproportionate to the exigency of the case, for it is not every assault that will justify every battery. If the violence used was greater than was necessary to repel the assault, the party is himself guilty.

3 Greenleaf's Ev., Sec. 64.

If you find from the evidence that the plaintiff made the first assault upon the defendant with his cane, the defendant would have a legal right to resist such assault with such force as was necessary to protect himself from the assault of the plaintiff. If you find from the evidence that the plaintiff, without any just cause or provocation, ran towards the defendant and struck him with his cane, and afterwards raised his cane to strike him again, and that the defendant believed and had reasonable grounds to believe that he was in imminent danger of great bodily harm, the defendant would be justified in using such force as he had reasonable ground to think was necessary to protect him from said danger, and if he only used such force, he would not be liable in this action. But if you find from the evidence that the plaintiff did make the first assault upon the defendant, the defendant would not be justified in using any more force to resist said assault than he believed, and had reasonable grounds to believe, was necessary to protect him from the assault of the plaintiff. And if you find that the defendant did use more force than he believed, and had reasonable grounds to believe, was necessary to protect himself from the assault of the plaintiff, the plaintiff would be liable for said excessive force and no more.

Now, gentlemen, if you find for the plaintiff under the evidence and instructions given you by the court, it will be your duty to assess such damages to which you find the plaintiff is entitled.

Voris, J., in *Pford v. Pixley*, Summit County Common Pleas. See *Stewart v. State*, 1 O. S. 66; 1 Bishop's Cr. Law, Sec. 865; *State v. Burke*, 30 Ia. 331.

No. 35. Degree of force in assault and battery.—The law does not measure nicely the degree of force which may be employed by a person attacked, and if he uses more force than is necessary, he is not responsible for it unless it is so disproportionate to his apparent danger as to show wantonness, revenge, or a malicious purpose to injure the assailant.

Voris, J., in *Pford v. Pixley*, Summit County Com. Pleas; 1 O. S. 66.

No. 36. Damages recoverable in civil action.—If you find from the evidence that the defendant is liable in this case, the plaintiff is entitled to recover such damages as compensation as you shall find that he has sustained. And in determining said compensation you may consider the plaintiff's injuries which he has shown were inflicted by the defendant, if any. You may consider the mental and physical pain and suffering which the plaintiff has endured, if any, as a result of injuries unlawfully inflicted by the defendant, as I have instructed you.

The plaintiff in this case claims that he has been to expense in curing himself, and he asks special damages on account of said expenses and care, and nursing. Now I say to you, if you find from the evidence in this case that the defendant is liable, the defendant would be entitled to recover such sum (not exceeding ——— dollars) that he has shown you by the evidence that he has expended or incurred in that behalf, if any. He would not be entitled to recover any more for any special damages than he has shown you by the evidence to have incurred.

In assessing damages, if you find that the plaintiff is entitled to recover in this action, and you further find that the defendant acted maliciously, then you have the right, if you think proper, to go beyond the mere compensation and award exemplary or punitive damages, as a punishment to the defendant.

37 O. S. 20.

The plaintiff is not entitled to this last item of damages as a matter of right. It is entirely in your discretion to allow it or not for the purpose of a punishment. If you find that the plaintiff acted maliciously, you may in your estimate of compensatory damages, take into consideration and include

reasonable fees for counsel employed by the plaintiff to prosecute this action.

In no event would the plaintiff be entitled to recover more than (——— dollars) the amount asked for in his petition.

Voris, J., in *Pford v. Pixley*, Summit County Common Pleas.

No. 37. A person may protect himself and child.—A man may protect his person and that of his child by opposing force to force, nor is he obliged to wait until he is struck, or if the weapon be lifted in order to strike, or if the danger of any other personal violence be imminent, the party in such imminent danger may protect himself by striking the first blow and disarming his assailant. But here also the opposing force or means of defense must not be unreasonable or disproportionate to the exigency of the case. No more force is to be used than necessary to prevent the violence impending. Where one is assailed he may use such means as are necessary to repel the assailant, or to prevent his own material injury.

D. J. Nye, Judge, in *State v. Kimball*. "It is conceded that parent and child, husband and wife, master and servant would be excused should they even kill an assailant in the *necessary* defense of each other," etc. *Sharp v. State*, 19 Ohio, 379, 387. *Brothers may protect each other if not at fault*. *Smurr v. State*, 105 Ind. 125; *Waybright v. State*, 56 Ind. 122; 1 Bishop's Cr. Law, Sec. 877.

No. 38. First assault made by prosecuting witness—How far defendant may go to protect himself.—If you find from the evidence that the defendant made the first assault upon the prosecuting witness without just cause or excuse, and shot him or shot at him, such fact may be considered by you in determining whether the defendant is guilty or not guilty, as charged in the indictment.

If you find from the evidence that the prosecuting witness made the first assault upon the defendant, or attempted to make an assault upon the defendant, and you further find that the defendant went no further than was necessary to protect himself and child from the assault or attempted assault, then the acts of the defendant would be justifiable, and he would not be guilty of the crime charged.

If you find from the evidence that the prosecuting witness made the first assault on the defendant, or attempted to make an assault upon the defendant, and you further find that the defendant went farther than was necessary, and from all the facts and circumstances of the case the defendant had a right to believe was necessary to protect himself and child, the defendant would be liable for such excessive force used.

It is left for you to say whether or not the prosecuting witness did make the first assault upon the defendant, and if he did, if the defendant went beyond what was necessary, and from all the circumstances of the case he had a right to believe was necessary to protect himself and child from such assault.

Nye, J., in *State v. Kimball*; 1 Bishop's Cr. Law, Sec. 877.

No. 39. One voluntarily provoking assault may recover if he afterwards withdrew.—One voluntarily provoking an assault may recover when his adversary voluntarily renews the conflict. If the plaintiff voluntarily brought upon himself the injuries complained of, it would seem absurd to say that he should be awarded exemplary damages resulting therefrom. But, though he may have provoked the battery, if he afterward withdrew from the conflict, the defendant could not make the provocation an excuse for following him up and beating him after he had so withdrawn.

In that case, if the defendant did voluntarily renew the conflict, the plaintiff in good faith endeavoring to avoid it, and thereupon wrongfully beat and wounded the plaintiff, and he was thereby injured so that you can see that he sustained substantial damages therefrom, then the plaintiff would be entitled to recover compensatory damages, at least, for the injury so done, and if the renewal of the assault was of a character to bring the act within the provision of exemplary damages, it would not defeat the recovery of exemplary damages.

It is the law of Ohio that one who provokes a fight may recover from his antagonist for injuries inflicted by the latter when he oversteps what is reasonable under the circumstances and unnecessarily injures such person, but he can not recover for any injuries that resulted from any reasonable resistance to the attack made by the plaintiff.

Voris, J., in *Otto v. Mills*, Summit Co. Com. Pl.

It is said by Minshall, J., in *Barholt v. Wright*, 45 O. S. 177, 181: "It is upon the mere principle of public policy that one who is the first assailant in an assault may recover of his antagonist for injuries inflicted by the latter, where he oversteps what is reasonably necessary to his defense, and unnecessarily injures the plaintiff, or that, with true want of consistency, permits each to bring an action in the case, the assaulted party for the assault first committed upon him, and the assailant, for the excess of force used beyond what was necessary for self-defense." *Dole v. Erskine*, 35 N. H. 503; *Cooley on Torts*, 165; *Darling v. Williams*, 35 O. S. 63; *Gizler v. Witzel*, 82 Ill. 322. It would seem that under the code the right of each combatant to damages might have determined a measure in the same action. *Id.* *Swan's P. and P.* 259 N. a.

No. 40. Assault by a school teacher upon pupil.—It is claimed by the state that the defendant was a teacher in the public schools at ———, and that the assault and battery was committed upon C., who was at the time one of the pupils in the school taught by the defendant. The defendant admits that he was a teacher as alleged, but says that for the purpose of correcting the said C., who was then a pupil in said school, he did take hold of him, and did then and there administer to him such corporal punishment as was necessary for the proper government of the school, and that he had a right to administer said punishment, and in doing what he did he committed no assault and battery and no offense whatever.

You are instructed that a school teacher has a right to give moderate corporal correction to his pupils for disobedience to his lawful commands, negligence, or for insolent conduct.

Reeves' Dom. Rel. 534; 1 Bishop's Cr. Law, Sec. 886.

It is not an assault and battery for a teacher to correct and punish a pupil in a reasonable way. But if a punishment be extreme, unreasonable, or cruel, or such as would naturally occasion permanent injury to the pupil, or if inflicted merely to gratify an evil passion, the teacher would not be justified, and would be guilty of assault and battery.

Field's L. B., Sec. 267; *Boyd v. State*, 16 Am. St. 31; 1 Bishop's Cr. Law, Sec. 886.

The right of a school teacher to correct his scholars has been practically and judiciously sanctioned, but the punishment must not exceed the limits of moderate correction. A teacher, in the exercise of the power of corporal punishment, may not make such power a pretext of cruelty or oppression, but the cause must be sufficient, the instrument suitable, and the manner and extent of correction, the part of the person to which it is applied, and the temper in which it is inflicted should be distinguished with the kindness, prudence, and propriety which become the station of the teacher. There are two important questions for you to consider and determine. First, was the defendant justified in administering or inflicting any punishment upon C.? Second, was the punishment which was inflicted, if any, reasonable and proportionate to the offense of the pupil, and was it appropriate in its kind and character, such as a teacher had a right to inflict?

To apply these principles of law to this case, if you find from the evidence which has been given to you that the con-

duct of the pupil on the day that the injury is said to have been inflicted was such as to deserve and merit punishment, then as a matter of law the defendant would have been justified in inflicting such punishment as the particular circumstances of that case required and deserved.

But whether the circumstances of that particular case were such as to require any punishment is a question of fact for you to determine from all the circumstances of the case. But if you find from the evidence that the conduct of the pupil was such as not to merit or deserve punishment, then as a matter of law the defendant would not be justified in inflicting any punishment whatever upon him. The defendant would not be justified in inflicting corporal punishment upon the person of C. without any just cause, nor unless it was done for the purpose of correcting or disciplining for a violation of the defendant's lawful and reasonable commands as such teacher.

The defendant would not be justified in inflicting corporal punishment upon the pupil for the purpose of gratifying the defendant's passion or malice; if it was done for the mere purpose of gratifying the passion or malice of the defendant and without just cause, then any punishment inflicted for that purpose would be unlawful and constitute an assault and battery.

If you find from the evidence which has been given to you that the conduct of the pupil was such as to deserve and merit punishment, and the defendant undertook and did administer punishment, it was his duty to do it in a reasonable and moderate manner, and to use only such means as was reasonable and proportionate to the offense committed by the pupil.

But if you find from the evidence that there was a just cause for the punishment, and that the defendant used extreme, unreasonable and cruel punishment, he would be guilty for the excessive punishment so used. And if the excessive punishment was unreasonable and grossly disproportionate, such excess would constitute an assault and battery.

If you find from the evidence that the conduct of the pupil was such as to justify the defendant in punishing him, it was the duty of the defendant to use a suitable and proper instrument, and administer punishment in a reasonable and proper manner, and if the defendant punished the pupil in an unreasonable and improper manner, by reason of a sudden and violent passion through malice, such punishment would not only be unjustifiable, but unlawful.

It is for you to determine as a question of fact from the

evidence, under the instructions given you, whether or not the conduct of the pupil was such as to justify the defendant in administering to him any punishment whatever.

If you find that he was not justified in administering any punishment, and you further find that the defendant unlawfully struck, beat, wounded, or ill treated the pupil, then you should so determine by your verdict.

But if you find from the evidence that the conduct of the pupil was such as to merit and deserve some punishment, it will be necessary for you to go further and determine from the evidence whether the punishment administered was reasonable and commensurate with the offense committed. If you find it was, then the defendant would not be guilty.

Nye, J., in *State v. Joseph Seaton*, Medina Co. Com. Pleas; 1 Bishop's Cr. Law, Sec. 886.

No. 41. Assault with intent to rob includes assault and battery.—"If the jury find that the defendant had not used such force and violence as makes him guilty of assault with intent to rob, he may be found guilty of assault and battery."

From *Hanson v. State*, 43 O. S. 376.

No. 42. Assault with intent to kill — Of what jury may find defendant guilty.—"If you should find from the evidence that had death resulted from the assault, the killing would have been manslaughter only, then you should find him, the defendant, guilty of assault and battery only and not guilty of assault with intent to kill. But if you should find that such killing, had death resulted, would have been murder in the first degree or murder in the second degree, then you should find the defendant guilty as charged in the indictment."

From *State v. Stout*, 49 O. S. 270.

The following extract is from a charge given by Judge Timothy Walker, on the trial of certain persons indicted for assault with intent to kill, and is quoted by the Supreme Court in the *State v. Stout*, *supra*: "You will inquire whether there was an assault with intent to murder. An assault is an attempt or offer, with force and violence, to do some corporal hurt to another. If the attempt or offer be carried into effect, there is more than an assault; there is battery also, and the only question is as to the intent. Was it to commit murder? In other words, if M. had been killed, would the prisoner be guilty of murder? If they were attempting to commit a burglary, it would have been murder in the first degree. If not, and they had yet killed him maliciously, it would have been murder in the second degree. Either will satisfy the statute. But if you think the killing would have been manslaughter only, you can not convict. And this must be the case, if you believe, either that there was no intention to kill, or, if an intention, that it was the effect of passions, roused in a sudden quarrel, and that there was no malice, that is, no culpable disregard of another's rights."

Ohio v. Shields and Robinson, 1 W. L. J. 118.

In the opinion in the case of State v. Stout, occurs the following: "The object sought in charging a jury is its enlightenment. The court may, rightfully, refuse to give a correct proposition to a jury where it would lead to confuse them, or not contribute to their enlightenment, unless amplified and explained."

ALIBI.

No. 43. Alibi—Explained fully.—The defendant, under the plea of not guilty, and as an independent defense, says that he was at another place, and therefore could not have taken the property named in the indictment. This is what is termed in law an *alibi*. *Alibi* is a *Latin* word signifying elsewhere, and in law means a defense interposed by the defendant by which he attempts to prove that at the time of the commission of the offense he was at some other place than that where it was committed. An *alibi* is a legitimate and proper defense to make, and if satisfactorily made is conclusive. It is obviously essential to the satisfactory proof of an *alibi*, that it should cover the whole of the time of the transaction in question, or so much of it as to render it impossible that the prisoner could have committed the act. If the defendant was not at the place of the commission of the alleged crime, as a matter of course he could not have committed the crime himself by his own hands. Whether or not the defendant has proved an *alibi* is a question of fact for the jury to determine; and in doing so you should look to and consider all the testimony upon that subject and which in any way tends to prove or disprove it.

Nye, J., in State v. McBride, Lorain Co. Com. Pl. See Whittaker's Code Ev., pp. 406, 490.

No. 44. Character of evidence to prove.—It is not required that the defendant prove this defense beyond a reasonable doubt, nor by a preponderance of evidence, to entitle him to an acquittal; it is sufficient if all the evidence raises a reasonable doubt of his presence at the time and place of the commission of the crime charged; or in other words, you must determine from the whole evidence whether it was shown beyond a reasonable doubt that the defendant committed the crime with which he is charged.

Walters v. State, 39 O. S. 215; State v. Harden, 46 Ia. 623; State v. Jaynes, 78 N. C. 504. Failure to prove an *alibi* affords no presumption of defendant's presence. Toler v. State, 16 O. S. 583.

“But the evidence must cover all the time during which the crime was committed. You should be fully satisfied by a preponderance of the evidence that these defendants were at H.’s, the place where they claim to have been at the time the crime was committed, all the time while the crime was being committed, or at such time that they could not, with any ordinary exertion, have reached the place where the crime was committed.”

State v. Hardin, 46 Ia. 628. See instructions in State v. Waterman, 1 Nev. 543.

BAILMENTS—See Common Carriers.

BANKS, BANK DEPOSITS AND BANK CHECKS.

No. 45. Bank deposits—What officers may receive.—The president of a national bank does not, under and by virtue of the act of Congress establishing and governing national banks, nor under the general rules of law applicable to banks and banking, by virtue of his said office of president, have power and authority to execute and issue certificates of deposit of said bank, and the certificate so issued by him does not, by reason of the fact that it bears his name as president, bind such bank.

The only officer of a bank who, by virtue of his office, has authority to receive deposits offered to a bank, and to bind the bank by his certificate therefor, is the duly elected and acting cashier. But the president may be authorized expressly, or by custom or usage in the conduct of the business of said bank, to transact any or all the duties devolving upon the cashier by virtue of his, the cashier’s, office. It is competent for the board of directors to clothe the president with the authority and power to receive deposits and bind the bank by his official signature as president to certificates of deposit as effectually as the cashier may do. It is not required that this authority to the president be conferred by any express or formal action by the directors, but it may be implied from circumstances, or a long uniform course of delay on the part of the bank. If the president in his capacity as president

has been in the habit of receiving deposits and issuing certificates therefor, which habit has existed for a considerable length of time, and the directors, or a majority of them, for a long time knew of such habit, making no objections thereto, then an authority from them to the president to do such acts may be presumed, and if these acts were frequent, long continued, open and notorious, the knowledge of the directors may reasonably be presumed.

By Cyrus Newby, Judge, in *Carlisle Barrere v. The Citizens Natl. Bank of Hillsboro of Highland Co. Com. Pleas.*; 4 *Thomp. Corp. Sec.* 4626.

No. 46. Duty of bank directors.—It is the duty of the board of directors of a bank to give such attention to its business as will enable them to become acquainted with and know the manner in which the business of the bank is being conducted, and to ascertain whether any officers constituted or appointed by them are disregarding or exceeding the authority intrusted to them by the board; and if the directors, in a careful and prudent discharge of their duties in this behalf, and by the employment of an ordinary amount of care therein, could, or might have discovered that their president was usurping the functions of the cashier to the extent of receiving deposits and issuing certificates of the bank therefor, they will be charged in law with such knowledge as they could have thus obtained, and their silence and failure to object under such circumstances, would in law amount to an authority from the directors to the president to do the acts he assumed to perform in that regard, and to bind the bank therefor.

Cyrus Newby, Judge, in *Barrere v. Citizens Natl. Bank, Highland Co. C. P.* *Morse on Banks, Secs.* 125, 128.

No. 47. Bank estopped to deny authority of officers.—And if the directors of a bank, or a majority of them, without objection or protest on their part, suffer and permit the president without authority expressly conferred, to exercise the duties of the cashier in the receipt of deposits and issuances of certificates of the bank to an extent that would justify a person with ordinary prudence and caution dealing with the bank, in the reasonable belief that the president had the proper authority from the directors to receive money and to perform the functions of the cashier, and if parties dealing with the president in good faith rely upon the appearances thus created, the bank will be estopped to deny that their president possessed the authority apparently possessed by him. But he must have relied in good faith upon

such appearances, and if he knew that the president was exceeding his authority, or if he was in possession of knowledge of facts or circumstances which would arouse the suspicion of a man of ordinary intelligence and caution as to whether the president was dealing for the bank within the scope of his authority, under such circumstances, he would not be justified in relying upon such appearances, although but for such knowledge on his part he would be protected.

Cyrus Newby, Judge, in *Barrere v. Citizens' Natl. Bank, Highland Co.*
Com. Pl.

No. 48. Relation of bank directors to public—Liability for defaulting officers.—The directors of a national bank are guarantors to the public of the fidelity and integrity of the officers and agents selected by them for the management of the business of the bank, while those officers and agents may be acting within a reasonable scope of their duties as such officers. Where, therefore, there has been a misappropriation or embezzlement by an officer of a bank of a deposit received by such officer from a depositor for the bank by its authority, the loss will fall upon the bank and not upon the depositor. If an officer of the bank, therefore, be authorized by the board of directors, either expressly or impliedly by their acts, to receive deposits for the bank and issue certificates therefor; and if the plaintiff at the bank and in the usual course of business delivered to such officer to be deposited in the bank, money which the officer received and issued certificates therefor in the money of the bank, then the plaintiff is entitled to recover from the bank the amount so deposited.

Cyrus Newby, Judge, in *Barrere v. Citizens' Natl. Bank, Highland Co.*
Com. Pl.

No. 49. Liability of drawer of check.—To render the drawer of a check liable to the holder, it will be sufficient if a demand upon the bank has been made, at the bank, during the usual hours of business, and notice of non-payment given to the drawer at any time before suit is brought against him thereon, unless it appear that the bank has failed during the delay of presentation, or the drawer has in some other manner sustained injury by the delay of the demand, or delay of notice of nonpayment.

From *Frey v. Gragg*, S. C.

No. 50. The nature of a check.—Rules regulating rights and liabilities of parties thereto.—You are instructed that

a check is a draft or order, drawn for the immediate payment of money, and that they are of such common use as to answer as payment for considerable amounts of money. Certain usages have grown up peculiar to this class of instruments, which have become engrafted on the commercial law of the land. A check is drawn upon an existing fund, and is an absolute transfer or appropriation to the holder, of so much money in the hands of the drawee. The drawer of a check is the principal debtor, and one who places his name on the back is an endorser. As between the holder or payee of a check and an endorser, demand of payment within the time due is essential to the liability of such endorser. Where the parties reside in the same place, the holder should present the check on the day it is received, or within business hours of the following day. Mere delay in presenting a check in due time for payment does not discharge the drawer, unless he has been injured thereby, and then only to the extent of his loss. A check does not have to be accepted, and when presented it is for payment, and is payable when presentation and demand is made.

Morrison v. Bailey, 5 O. S. 13; Kinhead's Code Pldg., Sec. 289.

BASTARDY.

No. 51. Who is the father of the child—Evidence.—

Where the complainant is an unmarried woman, and the question as to whether or not she has been delivered of a bastard child, the court must instruct the jury what the proper rule of law as to the evidence is to prove who the father of the child is, which is: The plaintiff must satisfy you by a preponderance of the evidence of the truth of the fact that she alleges, that —— is the father of her bastard child. You must be satisfied only by a preponderance of the evidence, and not beyond a reasonable doubt, as in criminal cases.

In determining this question, gentlemen, you should take into consideration the whole evidence, and all the facts and circumstances proven on trial—giving to the several parts of the evidence only such weight as you think it entitled to; and in determining the weight to be given to the testimony of the plaintiff, and of the defendant, and of the several witnesses who have testified before you, you should take into considera-

tion their interest in the event of the suit—if any such has been shown; their conduct and demeanor while testifying; their apparent bias, or fairness, if any such appears; and their appearance on the witness-stand; the reasonableness of the story told by them; their means of knowing the facts they state, and all evidence and circumstances tending to corroborate or contradict such witnesses—if any has been proved.

In case the character of the witness is not in issue, the question of character can then only be considered in determining what credit she may be entitled to as a witness. In such case the gist or object of the action is to provide for the maintenance of the child, and the sole question then is to determine who the father of the child is.

Driggs, J., in *Chamers v. Roscoe*, Belmont Co. S. C., No. 1600.

BILLS AND NOTES.

No. 52. Action upon note—Denial of signature—Consideration of testimony as to.—There have been offered in evidence fifty signatures of J. N., which signatures are admitted by both parties to be the genuine signatures of J. N. For the purpose of comparing these signatures, they have been marked Exhibits 1 to 50, for the purpose of allowing you to compare the signatures with the note in suit with the admitted genuine signatures of J. N., to aid you in connection with the other testimony in determining whether the signature of J. N. to the note in suit is the genuine signature of J. N. The note in suit and the admitted genuine signatures of J. N. will be before you in the jury room for the purpose of allowing you to compare the name of J. N. on the note in suit with the admitted signatures. Witnesses have been called by both parties to express their opinions as to whether the name of J. N., attached to the note in suit, is genuine or not. These several witnesses have expressed their opinion before you upon that question. You are instructed that the opinion of such witnesses are competent, and may be considered. The weight to be given such testimony is entirely for you to determine. Their testimony may be given more or less weight by you in proportion as you believe the reasons which the witnesses give for their opinions are strong or weak—as their reasons appear satisfactory or unsatisfactory

to you. You are the sole judges of the weight to be given to the testimony of said witnesses, and of their credibility.

Nye, J., in *Ingersol v. Gafkey*, Summit Co. Com. Pl.

No. 53. Promissory Notes—Purchase before maturity without notice, of illegal consideration.—The definition of the terms which I have just used, may aid you in determining the questions in the case. If the purchaser pays cash for a note, he acquires it in the usual course of trade for valuable consideration. Before maturity is before a note, by its terms, is due and payable. Therefore, if you find that the plaintiff paid a cash sum for the note, before maturity, to a person authorized to sell it, and obtained the note, the note being payable to bearer, might pass by delivery; but the transfer is not defeated or affected by the endorsement of the payee, and the plaintiff would then have acquired it in the usual course of trade for a valuable consideration, and would be entitled to recover thereon, unless it appears from the evidence that he had, at the time, notice of the alleged considerations, already stated and claimed to be in the note, or that he had information which ought to have excited the suspicion of a reasonable man thereto, and having the opportunity, failed and neglected, or refused to inquire thereto, because he was afraid he would thereby learn what he did not want to know. It is not sufficient, if it only appears that he took the note under circumstances that ought to have excited suspicion in the mind of a prudent and reasonable man; but it must appear that he took the note under circumstances as show he acted in bad faith or with a want of honesty, and in determining whether he so acted, you will look to all the circumstances and the evidence of the fact, if proved, as claimed, that he paid less than its fair and reasonable value for the note.

If under all the circumstances, you find the plaintiff acquired and holds the note by purchase in good faith, in the usual course of trade for a valuable consideration before due, without notice of such infirmities, your verdict will be in his favor for —, with six percent interest to this date. Add together the sum so found, that is, the interest and principal, and the whole amount will be his damages.

If you are satisfied that the note was given for seed wheat at fifteen dollars per bushel and that such seed wheat proved worthless as such, then your verdict would be in favor of defendant, provided you further find that the plaintiff had notice of the worthless character of the wheat and of such consideration, or had such notice as to put him on inquiry,

and he failed to inquire, solely for the reason that he did not want to know the consideration.

From *Kitchen v. Loudenbeck*, 48 O. S., 177.

No. 54. Promissory notes—Consideration—Delivery—Denial of execution—Alteration—Expert testimony as to signature.—A promissory note implies a consideration. It is not valid unless delivered by the defendant to the plaintiff, though, if you find the note in the hands of the plaintiff, duly executed by the defendant, you may then presume that it was delivered.

Upon the question of the execution of the note the burden of proof is on the plaintiff, and he must satisfy you by a preponderance of evidence that the defendant did sign the note. If he fails to thus satisfy you, your verdict should be for the defendant. Upon this question you can take into consideration the testimony of the experts, persons who by their experience in the comparison and observation of handwriting, are permitted to give their opinion whether the signature to the note in question is by the same hand as the signature to the deed and will, which have been proven to be the genuine signatures of the defendant. With these opinions and the other evidence in the case, you are to say whether the same hand wrote all signatures. You are to determine the weight of the testimony of these experts. If you are not satisfied that they are right in their opinions, your verdict should be for the defendant.

(a) *Alterations in date.* If you are so satisfied you should then consider the question of alterations. These alterations, as claimed by defendant, are in the change of the date from an early to a later date, and in the body of the note a change in the principal. If these changes were made they are material changes, and if the plaintiff, without the consent of the defendant, made the alterations after the note was delivered, he has no right of action on this note. Has the note been altered? The figures at the left-hand top of the note are no part of the note, and a change in these figures is not material, but you may look at any alterations in those figures upon the question whether there was any alteration of the date or amount in the body of the note. Still, the question is, have any alterations been made?

Upon this question the burden of proof is on the defendant to satisfy you that these claimed alterations were made after it was signed. You may look at the note to see whether any alterations have been made in either particular. If you

find that there is no alteration, assuming that the signature of the note is the genuine signature of the defendant, your verdict will be for plaintiff. If the note was altered, and the burden of proof of that, as was said, is on the defendant, you will then inquire whether the alteration was before or after the defendant signed the note. If you find it was altered after defendant signed the note, the burden of proof will then be upon the plaintiff to satisfy you that it was altered with the consent of the defendant.

If the note was signed after it was altered, it is a good note. If it was signed before it was altered and the maker consented to the alteration, it is a good note.

Franklin v. Baker, Ex'r, 48 O. S., 296.

No. 55. Transfer of note after maturity—Effect of.—I will say this to you, that if the paper was transferred after it became due, and it no longer has the character of commercial paper before due, if it was transferred after it was due, the person to whom it was transferred steps simply into the shoes of the person that transfers it to him, and the maker of the paper can then urge against him, if he sues upon the paper, the same claim, the same suit, that he could make against the person to whom he originally gave the paper if he sued upon it.

Geo. B. Solders, Judge, in Platt v. Hazzard, Sup. Ct. No. 3276.

No. 56. Endorsement in blank explained—Transfer before maturity.—This note is payable to the order of J. W. T. H. gives him that note; there is nothing upon the face of the note to indicate any contract made at the time. It places it within the power of T. to transfer the note to anybody. He has signed his name upon the back of the note and nothing more, which is known as a blank endorsement, and that authorizes any person to whom he transfers it to write above it a transfer to him, or a transfer to some other person. In other words, this is not a restrictive endorsement; that is to say, a restrictive endorsement would be to a particular person only. The note is not given to T. individually, but it is given to him with the power of transferring it to anybody. The law makes that paper circulate as money before due. If action had been brought upon this paper by T., then Mr. H. could offset against him anything, any demand that he has against him, and especially could he offset this \$925.00, as the testimony indicates was due, and which the plaintiff does not controvert. If that contract was made at all he could

offset this against this note. If paper, commercial paper, which this is, is transferred before due to another person, who at the time pays value for it, such person holds the paper free from all claims and setoffs—and in that connection I wish to say to you that this man P. stands upon this paper as an endorsee, holding the paper. That where the endorsee of negotiable paper pays cash therefor he is a purchaser in the usual course of trade, unless the fact was that he paid for the note a sum less than the fair and actual value—not necessarily that he should pay the actual value, that is a matter of agreement—but if it is transferred before due, for value paid, there being no bad faith, or want of honesty at the time on the part of the person to whom transferred, he takes it clear from any claim that the maker of the note could urge against the person to whom he originally gave it, in this case T.

Geo. B. Solders, Judge, in *Platt v. Hazzard*, S. C. 3276.

“You are instructed that where a note has been endorsed in blank, the holder of the same may fill the blank with the name of the endorsee; that the endorsement of the note is said to be in blank when the name of the endorser is simply written on the back of the note, leaving a blank over it for the insertion of the name of the endorsee, or of any subsequent holder; and that in such a case while the endorsement continues blank, the note may be passed by mere delivery, and the endorsee or other holder is understood to have full authority personally to demand payment of it, or make it payable at his pleasure, to himself or to another person.”

From *Palmer v. Marshall*, 60 Ill. 292.

No. 57. Liability of surety on note—How revived—Effect of subsequent promise.—“If the defendant’s testator, having been discharged from his liability as surety upon the note sued on, with a full knowledge and understanding of his release as surety, promised the holder or payee to pay the note, if the principal did not, he thereby revived his liability as surety, and such subsequent promise was binding without any new consideration to support it.”

From *Bramble v. Ward*, 40 O. S. 267.

No. 58. Extension of note—Consideration therefor—Payment of interest in advance.—“The payment of interest in advance is not of itself conclusive evidence of a contract to extend the time of the payment for the term for which inter-

est may have thus been paid, but it is a strong circumstance to be looked to by the jury in determining the existence of the contract claimed."

From *Gard v. Neff*, 39 O. S. 607.

No. 59. Alteration of note—What constitutes—Adding words "with interest at — percent."—If you find from the evidence that after the defendant signed a note similar in all respects to the one sued on, excepting that the written words, "with interest at ten percent," and that these words were not then in the note, but that the printed words, "with interest at ten percent per annum after maturity," were in the note, and that, after the defendant placed his signature thereon, and without his knowledge or consent, the said printed words were stricken out and the said written words inserted, and that such an alteration of the note was made by any holder of the note, or made with the knowledge of any holder of the note, without the knowledge of the defendant, it would be a material alteration, and would release him from all liability on the note. And if the defendant proves this by a preponderance of the evidence, the verdict must be in his favor; and it would make no difference whether J., the plaintiff, was or was not the owner of the note at the time of the alteration, if he made the alteration after the defendant signed it.

From *Brooks v. Allen*, 62 Ind. 401.

No. 60. Alteration of note—By adding name of third person — Whether material or not.—The defendant, K., through his counsel, claims as a matter of law on the undisputed facts, that there was a material alteration of the note which discharges K. from liability thereon. Gentlemen, I charge you that if there was a material alteration of the note after its execution and delivery, with the consent of its holder, but without the knowledge or consent of K., such material alteration would discharge K. from any liability on the note. An alteration to be material must be of the note after it is signed and delivered, without the consent of the person who executed it. It is an undisputed fact that S.'s name was placed on the face of the note under K.'s name, and without K.'s consent; that far then there is no dispute. The question is, was it a material alteration? If so, K. is discharged. Now, did S. sign this note as maker? I have laid down the general rule, gentlemen, that when there is a material alteration of the note, with the consent of its holder, and without

the knowledge, procurement, or consent of the maker, it releases the maker of the note. It is conceded that the signing of S.'s name was without the knowledge, procurement, or consent of K. Then is the signing of the name of S. under the name of K. a material alteration of the note? It is a material alteration if he signed it as maker. The addition of the name of a third person as maker, with the privity of the holder, but without the consent of the original signer, is a material alteration of the note, which discharges such original signer. This would not be so, however, if the third person signed the note as an apparent maker through inadvertence or mistake as to any fact. In this case it is not claimed by S. that there was any mistake as to any fact relative to or connected with the signing of his name on the note. He claims in his testimony that he signed the note for the single purpose of vouching that K. was worth about \$3,000, but if there was no inadvertence or mistake of fact in his signing, he can not dispute or vary the written contract above his name which he signed. When he signed this paper (the note) his contract was in writing, and he will not be permitted to dispute it, unless he can show that there was some inadvertence or mistake as to some fact. Having signed the note on its face as an apparent maker, for a valuable consideration, he must be held to sustain to the note the relation of maker, unless he can show that there was some inadvertence or mistake of fact relative to or connected with such signing. It being conceded that his name was signed to the note with the privity of the holder, and without the knowledge or consent of K.; if he signed it as maker, it is a material alteration of the note which releases K. from all liability thereon, unless S. has shown that there was some inadvertence or mistake of fact in signing his name as an apparent maker. A mistake of law does not excuse him. Every person is presumed to know the law, and he is not permitted to say he did not understand the legal effect of his act. Before signing his name Mr. S. was what is called a "stranger" to the note. He would have been *prima facie* a guarantor of the note if he had placed his name on the back of it, in that case there would be a presumption that he was a guarantor. But, being a stranger to the note, and signing it on its face, signing the written contract, the written contract must be held to govern, unless he shows that there was some mistake of fact, not of law, in such signing. No one pretends to say that he didn't read the contract. No one pretends to say he meant to sign it any place but where he did sign it. If you find that the defendant, S., for a valuable

consideration, signed the note as maker, he is liable on the same, unless he can show some legal reason why he should not pay it.

John A. Price, Judge, in *Smucker v. Wright*, Sup. Ct. No. 1845.

No. 61. Alteration of note by inserting words "to be paid annually"—By whom made—Ratification of.—The defendants claim that after the note described in the petition was executed by said M., and without the consent or knowledge of either of them, the plaintiff altered said note by inserting or causing to be inserted in said note the words "to be paid annually" after the word interest. Thus by said alteration changing the terms of said note, making the interest payable annually instead of being payable when the note became due, and that they have never since ratified said alteration.

Such alteration, if made as claimed by defendants, would be a material alteration, changing the effect and operation of said note, and upon said note in such case the plaintiff could not recover in this action, unless said alteration has been ratified by the defendants, or by one of them.

That such alteration was made as claimed the defendants must prove by a preponderance of the evidence.

Such alteration, if made by a party not interested in the note, and without the knowledge or consent of plaintiff would not affect the note.

If said alteration of said note was made by plaintiff, as claimed, and if afterward the defendants, or either of them, with full knowledge of such alteration, ratified the same by part payment, or by direct and unconditional promises to pay said note, then said defendants, or whichever of them so ratified such alteration, would be liable on said note as altered, and against the defendant who ratified said alteration the plaintiff can recover. Such ratification must be proved by the plaintiff by a preponderance of the evidence.

From *Miller v. Vollrath*, Sup. Ct. No. 1728. Judgments of lower courts affirmed. 27 W. L. B. 36. Alteration by a stranger does not vitiate. *Waring v. Smyth*, 2 Barb. Ch. 119; *Bank v. Roberts*; 45 Wis. 373. 1 Am. and Eng. Enc. of Law 505. See also 1 Greenleaf's Ev. Sec. 566; 2 Daniel's Neg. Inst. Sec. 1373a. *Drum v. Drum*, 133 Mass. 566.

No. 62. What must be done to hold endorser of note—Demand and notice—Waiver of.—It is conceded that said defendant O. is the endorser of said note. In order to hold said O. as such endorser of the note the plaintiffs must prove by a preponderance of the evidence that demand was made on M.—that is, a presentation of the note and a request to pay it when due on the — day of February, 18—.

If the demand was made on M. personally, or, if he was gone from home, upon any agent of his at his home or place of business whose duty it was to transact business or pay money for him; if there was no agent and M. was away from home, then at the house of his wife or servant, or, in the absence of wife or servant, of some other person belonging to the family, and if there was no such agent and no person at home, and upon reasonable inquiry none of the persons I have named could be found and M. was gone, no demand was necessary.

If demand was made and payment refused, notice of such demand and nonpayment, or if no demand could be made, notice of nonpayment should have been communicated to said O. by the first ordinary means of giving him the information taking into account his whereabouts.

By mail. *Walker v. Stetson*, 14 O. S. 89. By the next mail after default. *Lawson v. Bank*, 1 O. S. 206. By mail if living in same town. 8 O. 507.

The endorser may waive demand and notice of nonpayment, and any conduct on his part toward the plaintiff, calculated to put a person of reasonable prudence off his guard, or to induce such person to omit demand or notice of nonpayment will dispense with the necessity of taking such steps. That such demand was made and notice of demand and nonpayment was given, or that the same was waived by the defendant, O., the plaintiff must prove by a preponderance of the evidence.

From *Mills v. Vollrath*, Sup. Ct. No. 1728. Judgments of lower courts affirmed. 27 W. L. B. 36. As to waiver see *Hale v. Danforth*, 46 Wis. 554.

No. 63. Endorsement of note — Endorser entitled to notice.—You are instructed that an endorsement of a note, that is, the writing of one's name upon the back of the note, is an absolute contract in writing by which the endorser binds himself to pay the note, if on presentment the maker does not, provided due notice is given of nonpayment.

In order to render one who becomes an endorser on a note not liable for the payment, the note must be presented at maturity to the maker for payment, and if payment be refused, notice must be given immediately to the endorser, and whether this has been done is a question of fact submitted to you for determination.

Farr v. Ricker, 46 O. S. 265.

No. 64. When maker of note entitled to demand.—You are instructed that it is not generally necessary that presentment or demand of payment be made at a specified place of the maker of a note on the day it becomes due or afterwards, in order to maintain a suit against the maker. But if the maker has funds at the appointed place where the note is payable, and it is not duly presented, he will be exonerated from the payment of any damages that may have been sustained and costs of suit, but will not be relieved from the payment of the note.

Bridge Co. v. Savings Bank, 46 O. S. 224.

BREACH OF PROMISE TO MARRY.

No. 65. Breach of promise to marry defined—May be entered into how.—A contract of marriage consists simply in a promise on the part of the one to marry the other, and in a promise on the part of the other to marry the one. It is a mutual promise, the consideration of the one's promise being the other's promise.

Contracts of marriage may, like other contracts, be either express, that is, based upon actual, particular words, a direct proposition on the one part, and a positive, explicit, verbal acceptance of the proposition by the other, or the marriage contract may arise by implication; that is to say, that such a contract may come into existence, as a result of the conduct and demeanor of the parties by their acts towards and treatment of each other, by frequency of association together and by other circumstances of like nature.

D. Thew Wright, J., in *Hunter v. Graham*, Hamilton Co. C. P.

May be shown by conduct. *Wetmore v. Mell*, 1 O. S. 26.

Admissions of intention to marry may be shown. *Cooper v. West*, 3 W. L. B. 481.

No. 66. What amounts to a breach.—As a general rule it may be said that when an obligation is entered into to do a certain thing in the future, and partly when an express time is indicated within which the things shall be done, before suit can be brought for the breach of an obligation, there must be a request by the person who seeks to enforce the contract of the party to perform his obligation. The marriage contract is no exception to this rule of law, being regarded

by the law simply as a civil contract. Before there can be a breach of the contract there must be an express request to consummate the marriage, or something which under the circumstances of the particular case removes the necessity of that request. A man could not complain of a woman for breach of promise to marry unless he requested her to keep her engagement, neither can a woman complain of a man for breach unless there is a request made of him.

If a man agrees to do a thing within a reasonable time and afterwards upon being requested to do it refuses, then he has repudiated his obligation and broken his contract. In the absence of a request and in the absence of indicative circumstances, he may intend to keep or he may intend to break his contract, but it may be important to see what his intentions are. If it can be said that he intends to break or keep his contract, it may be more difficult to determine and to say that he has actually broken his engagement.

If the plaintiff became convinced or fearful that the defendant did not intend to carry out his part of what was understood to be their engagement to marry, she might have gone to him and verbally tendered herself to him, and requested that he should marry her in fulfillment of the contract. That would have been a perfect and thorough compliance with the law, and a thing eminently proper. But circumstances may intervene which will remove the necessity for this explicit action upon her part.

If it appears from the evidence that there was an engagement, and that the defendant himself broke that engagement, the fact appearing to the jury either by the acts or words of the defendant, or by both his words and his conduct, then it is not necessary that the plaintiff should have offered herself to the defendant in marriage, or that she should have formally requested him to marry her before bringing this suit. The law assumes that where a man is under an obligation to fulfill a contract, if he voluntarily renounces it, he puts himself in the attitude of refusing in advance to carry out the contract, and that knowledge is clearly brought home to the other contracting party, then the necessity for the offer or request from the other party is removed and taken away, because it is useless.

If you find that there was a contract of marriage, and a breach of that contract by the defendant, the only question remaining for your determination is, Was the plaintiff damaged by this breach, and if so, in what sum?

D. Thew Wright, Judge, in *Hunter v. Graham*, Hamilton Co. Com. Pleas.

No. 67. Promise made in consideration of sexual intercourse.—If you find from the evidence that the defendant did promise the plaintiff to marry her, but that the inducement for the making of such promise by the defendant was that the plaintiff should permit him to have sexual connection with her, then I charge you that such promise would be void, and the defendant not bound by it. An agreement to marry, made by a man to a woman in consideration of having sexual intercourse with her before marriage is immoral and void. "As the object of the law is to repress vice and immorality, and promote the welfare of society, all promises which originate in a breach or violation of its principles and enactments, are void. This law will not therefore lend its aid to enforce any contract which will lead to the commission of crime or immorality, or which is subversive of public morality." So if there was a contract of marriage, but it was made on condition and on the consideration that the plaintiff should allow the defendant to have sexual intercourse with her before marriage, such contract was void and no recovery can be had for its breach, it being founded on an immoral consideration.

2. Parsons Con. 68.

"But it is no defense if the promise was made after fornication; if made with no view to a repetition of the offense, or before fornication, if that was not the consideration of the promise, if the consideration was the mutual promise of marriage—the promise of each to marry the other—the contract was a valid one notwithstanding there may have been sexual intercourse between the parties, either before or after the promise was made. If it appears that the promise was made by the defendant with a view to seduce the plaintiff, and that the defendant thereby did in fact seduce the plaintiff, this will be no defense, but may go to the jury in aggravation."

Wm. E. Evans, Judge, in *Little v. Gearhart*; affirmed 51 O. S. 580; *Sedgwick Meas. Dam.* 455, (369.) As to promise based on sexual intercourse being void, see *Hanks v. Naglee*, 54 Cal. 51; *Boigneres v. Boulon*, 54 Cal. 146; *Steinfeldt v. Levy*, 16 Abb. Pr. (N. S.) 26; *Goodall v. Thurman*, 1 Head, 209.

"A promise to marry is not unfrequently one of the base and wicked tricks of the wily seducer to accomplish his purposes, by overcoming that resistance which female virtue makes to his unholy designs. Whenever seduction follows an engagement to marry, it may well be asserted that the promise on the part of the man was intended to cover his designs upon her virtue, by winning her affections and confidence. The fact that the hypocritical suitor is prepared to destroy her character, shows conclusively that it was not his intention to make her his wife." *Goodall v. Thurman*, 1 Head 209.

In *Hotchkins v. Hodge*, 38 Barb. 117, the court held: "A wrong done to the female, such as sexual intercourse with her, by her alleged suitor,

will not make a promise to marry, founded thereon or arising therefrom, invalid or inoperative. Such a promise is not liable to the objection that it encourages immorality."

No. 68. Evidence of preparation for marriage.—Evidence has been offered to prove that the plaintiff made some preparations for marriage by procuring bedding, etc., and statements by her at the time, explanatory of such acts of preparation. To be admissible in evidence such declarations must be made at the time of such alleged act of preparation, must be concomitant with them, and explanatory of them; and such acts must be before the rupture between the parties, before the breach of the promise. If such declarations were made, but were merely narrative of a past occurrence or transaction, or the acts of which they were explanatory were after the rupture between the parties, they are incompetent as evidence, and you will not consider them, but will treat them as excluded from the case. If such declarations were made and were concomitant with and explanatory of acts of preparation for marriage, and such acts were before a rupture between the parties, they are competent to be considered by you.

William E. Evans, Judge, in *Little v. Gearhart*, 51 O. S. 580. *Wetmore v. Mell*, 1 O. S. 26.

As to promisee's conduct in getting ready, see *People v. Kenyon*, 5 Parker's Cr. C. 254; and her declarations, 2 Am. and Eng. Enc. of Law, 521. Declarations to strangers of the fact of the engagement are not competent unless part of the *res gestæ*. *Stribley v. Welz*, 8 O. C. C. 571.

No. 69. Measure of damages.—If you find in favor of the plaintiff, you will award her damages to indemnify her for the loss she may have sustained by such breach of promise. This would embrace the injury to her feelings, affections, and wounded pride, as well as the loss of marriage.

Sedgewick Meas. Dam. 369.

There is no precise rule by which to fix the amount of compensation. The measure of damages is a question for the sound discretion of the jury under the circumstances of the case as disclosed by the evidence. This is to be sound discretion uninfluenced by passion or prejudice; and the amount of damages is to be such sum as the jury, exercising such judgment and discretion under all the circumstances of the case as shown by the evidence, determine and find is proper and adequate to indemnify and compensate the plaintiff for the loss and injury so sustained.

Sedgewick, 369, 210.

If the defendant's conduct in the matter of the promise and breaking it (if he did so) was ruthless and wanton toward the plaintiff,

Duvall v. Fuhrman, 3 O. C. C. 305.

you may, if you think it proper under all the circumstances of the case, in addition to compensatory damages, award exemplary damages in such sum as you think proper under the circumstances. The entire amount of the award can not exceed the amount claimed in the petition.

Wm. E. Evans, Judge, in Little v. Gearhart. Judgments affirmed, 51 O. S. 580. Seduction may be shown to enhance damages. Matthews v. Cribbett, 11 O. S. 330. Value of defendant's estate may be shown to show greater loss. 8 O. C. C. 571; 3 O. C. C. 305; and subsequent acquisitions of property may be considered. 3 O. C. C. 305.

BURGLARY.

No. 70. Burglary and larceny—Force necessary in.—

As to the force necessary to constitute a breaking, it may be the lifting of a latch, making a hole in a wall, descending the chimney, picking, turning, or opening a lock with a false key or other instrument; lifting a latch or other fastening,

81 Ia. 93.

removing a pane of glass; pulling up or down an unfastened sash; removing the fastening of a window by inserting the hand through a broken pane; pushing up a window which moved on hinges and so fastened by a wedge, and other like acts. It has also been held by the highest court of this state that: "The force necessary to push open a closed but unfastened transom that swings horizontally on hinges over an outer door of a dwelling is sufficient to constitute a breaking under our statutes, which requires a forcible breaking."

34 O. S. 426.

Then as a matter of law to constitute a burglary there must be a forcible

The constructive breaking of the common law is sufficient under the statute. Ducher v. State, 18 O. 308. Clark's Cr. Law, p. 234.

breaking which must precede the entry,

Wine v. State, 25 O. S. 69.

but it is not necessary that there should be any destruction

of a building, or any destruction of the parts of the building. If you find from the evidence that the doors of the car were closed, and that the fastenings of the door of the car were removed, and the door pushed or forced open, that would be sufficient to constitute a breaking under our statute.

Nye, J., in *State v. Kemp*, et al., Lorain Co. Com. Pl. R. S. Sec. 6835. Entering dwelling by a trick has been held burglary. *State v. Henry*, 9 Iredell, 463.

No. 71. Burglary—Degree of force.—"If the jury are satisfied beyond a reasonable doubt as to all the other elements necessary to constitute a burglary except a breaking, and find that the transom was closed on the night in question, though not fastened, and that the defendant used sufficient force to push it from its place, so that it would swing open, that would be a sufficient breaking in law, and, under the circumstances, if satisfied beyond a reasonable doubt, their verdict should be guilty."

From *Timmons v. State*, 34 O. S. 426.

No. 72. There must have been an entry.—The second essential to constitute a burglary is that there must have been an entry into the car named in the indictment, and as a matter of law you must find from the evidence that there was entry into the car of the C. C. C. & St. L. Ry. Co., the car named in the indictment, before you find that the burglary was committed.

And I say to you further that it would not be necessary that the whole person of the burglar . . . go within the car. It would be sufficient entering the car if he reached a hand into the car, and it would be a sufficient entry in the car if he thrust a stick, a fork, or a hook into the car with intent to steal property contained therein. That would be a sufficient entry, providing you find the other things necessary to constitute the crime of burglary.

Nye, J., in *State v. Kemp*, Lorain Co. Com. Pl.; R. S. Sec. 6835. Both the *entry* and *breaking* are essential, though they need not be simultaneous. *Malone's Cr. Briefs*, 186; 1 Hale, 551.

No. 73. Must be in night time.—It is necessary that both the breaking and the entering should be done in the night time. It is night in the sense of the law when there is not daylight enough left or begun to discern a man's face. Again night is defined as being: "That space of time during which the sun is below the horizon of the earth, during which by its light the countenance of a man can not be discerned."

Then you are instructed that the night season is that period of time after the sun goes down at evening and before it rises in the morning, when it is so dark that a person's face can not be discerned by the daylight. It was necessary, therefore, that the offense must have been committed in the night season to commit a burglary.

Nye, J., in *State v. Kemp*, Lorain Co. Com. Pl.; R. S. Sec. 6835. Night-time by common law begins when daylight ends, or when the countenance ceases to be reasonably discernible, and ends at earliest dawn, or as soon as the countenance becomes discernible. Clark's Cr. Law, 237; *People v. Griffin*, 19 Cal. 578; *State v. Bancroft*, 10 N. H. 105. "The jury must determine this question independently of a capricious test." Whart. Cr. Pl. and Pr., Sec. 1612; *Lewis v. State*, 16 Conn. 32. The nighttime may be shown by circumstantial evidence. *State v. Bancroft*, 10 N. H. 105.

No. 74. Intent to steal.—The fourth thing that is necessary to constitute the offense of burglary is that the breaking and entering must have been done with an intent to steal the personal property of some value of the C. C. C. & St. L. R. R. Co. situated in said car. It is not necessary that anything be actually stolen. The offense is complete under the statute if the defendant broke and entered the car named in the indictment, in the night, forcibly and maliciously with the intent to steal property of some value situated in the car of the said railroad company. But direct and positive testimony is not necessary to prove the intent. It may be proved by facts and circumstances. If you find from the evidence that the property was stolen from the car by the defendants, you may consider that fact in determining with what intent the defendants entered the car, if you find they entered it.

Nye, J., in *State v. Kemp*; R. S. Sec. 6835. The property intended to be stolen must be property subject of larceny. *State v. Lymus*, 26 O. S. 400.

No. 75. Breaking and entering must be malicious.—The statute provides that the breaking and entering must be maliciously done. Malice is any wicked or mischievous intention of the mind; a depraved inclination to mischief; intention to do an act which is wrong without just cause or excuse, a wrongful disregard for the rights and safety of others. In common acceptance it means ill will against a person, but in its legal sense it means a wrongful act done intentionally, without just cause or excuse.

If you find from the evidence that the defendant broke and entered the car of the railroad company in the night season with the intent to steal personal property contained in the car, the law will presume that it was done maliciously.

Nye, J., in *State v. Kemp*; R. S. Sec. 6835.

No. 76. Burglary of railroad car—Proof of incorporation not necessary.—"It is not necessary for the state to prove the articles of association or charter of the railway corporation, but it is sufficient to prove by reputation that there was, at the time when the crime is alleged to have been committed, a corporation known by that name, operating such road, and carrying goods, stock, and passengers for hire in its cars running along said company's road. *A de facto* existence of the corporation is only necessary to be shown."

From *Burke v. The State*, 34 O. S. 79. It would have been necessary before the code. *Id.*

CHATTEL MORTGAGES.

No. 77. Chattel mortgage—Essentials to validity.—The statutes with reference to filing chattel mortgages so far as they pertain to this case, are as follows: (Sec. 4150)

A mortgage or conveyance is intended to operate as a mortgage of goods, and chattels which is not accompanied by any immediate delivery and following by an actual and continued possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith, unless a mortgage or a true copy thereof be forthwith deposited as directed in the next section. The next section provides that: "The instrument mentioned in the last section shall be deposited with the township clerk of the township where the mortgagor resides at the time of the execution thereof, if a resident of the state," etc. "The officer receiving any instrument shall endorse thereon the time of receiving it, and its consecutive numbers." The statute further provides that, "the mortgagee, his agent or attorney, shall, before the instrument is filed, state thereon under oath that it is just and unpaid, if given to secure the payment of a sum of money only."

The other section of the statute provides that: "Every mortgage so filed shall be void as against the creditors of the person making the same. . . . After the expiration of one year after the filing of the same, unless within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage together with the statement verified as provided in the last section, together with a statement exhibiting the interest of the mortgagee in the

property last aforesaid, as claimed by virtue of said mortgage, is again filed in the office where the original was filed.

If you find from the evidence given you in this case that the chattel mortgage which the plaintiff has produced and offered in evidence was given for the consideration named therein, and that the same was verified and filed, and verified and refiled as provided by said statutes, and remained on file, the same would be a valid mortgage and a lien upon the property therein described, to the extent of the amount of money therein named.

Nye, J., in *Bebbee v. Ensign*.

COMMON CARRIERS.

No. 78. Carrier defined—Liability for carriage of goods—Act of God, etc.—A common carrier is one that undertakes, for hire or reward, to carry, or cause to be carried, goods for all persons, indifferently, who may choose to employ him, from one place to another. The defendant admits that, as a common carrier, it undertook for reward to carry plaintiff's goods from M. to R., K. & Co., at C., but was prevented therefrom by the water-flood rendering said merchandise worthless. A common carrier is responsible for the safe transportation and delivery of goods received by him for carriage, and can only justify or excuse a default when occasioned by the act of God, or the public enemies; he is not only responsible for his own acts of malfeasance, misfeasance and negligence in the course of his employments, but he is also regarded as an insurer against all loss or damages which may happen to goods whilst in his charge, for the purpose of his employment, though occasioned by unavoidable accident, or by any casualty whatever, except only as just mentioned, and the burden of proof is thrown upon the carrier in bringing any particular case within the exception.

For, in the absence of proof, the loss itself raises the presumption of negligence on the part of the carrier. The act of the public enemies is not claimed as an excuse for the non-performance of duty; the available excuse for the nondelivery of the goods to the consignee there must be the act of God.

By the term "act of God" is meant something superhuman

—something beyond the power of man to foresee or guard against. It means inevitable accidents, something that happens without the intervention of man. Where one is pursuing a lawful vocation in a lawful manner, and something occurs which no ordinary skill or precaution could foresee or prevent, and as a consequence the accident takes place, this is called inevitable accident. A loss by fire is not a loss by act of God. It means those events and accidents which proceed from natural causes, and can not be anticipated and guarded against or resisted; such as unexampled freshets, violent storms, lightning and frosts. For losses occurring by any of these means, a common carrier is not liable, provided he has not been guilty of any want of ordinary and reasonable care to guard against such loss. Whether in this case such care and diligence were or were not used by the defendant, and whether the loss resulted therefrom, are questions for you to determine in view of all facts and circumstances proved on the trial. The burden of showing the use of ordinary care to prevent the loss is upon the defendant; this showing must be a preponderance of the evidence; that is, the evidence in its favor must outweigh in your minds through weight and importance all other evidence to the contrary. Otherwise you should find for plaintiff. Speaking in other words as to ordinary care, if you are satisfied by a preponderance of the evidence that the defendant used such care and diligence to prevent the loss of the goods entrusted to it as ordinarily prudent men usually exercise toward their own property under like circumstances, your verdict should be for the defendant; but if the evidence in this direction just balances by your consideration with the evidence to the contrary, or if such preponderance of evidence satisfies you that the defendant did not use such care and diligence, and the loss resulted therefrom, your verdict should be for plaintiff.

From *B. & O. R. R. Co. v. Crawford*. Affirmed by C. C. Settled in Supreme Court, No. 2236 (14-26). May, J.

No. 79. Limiting liability by special contract—Burden of proof.—“A carrier may restrict or limit the amount of its liability by a special contract accepted on the part of the owner of the baggage; and this may be done by notices brought home to the owner of the baggage before or at the delivery to the carrier, if assented to by the owner.”

“The onus of proving any qualification of the liability of the defendant as a carrier rests upon it. The notice, to be of any force, must amount to actual notice. At all events to exonerate the defendant as a carrier from its general liability

it must be shown at least, by the evidence, that the plaintiff, or those acting for her, assented to the demands of the notice or, with a knowledge of it, acquiesced in it by making no remonstrance."

"And in determining whether or not the conditions and limitations were brought to the notice of the plaintiff and those acting for her, you will look to all the evidence in the case; as to the manner of the delivery of the ticket and the check; whether anything was said or done calling attention to them or not; whether they were or were not read at the time of or before the receipt."

From *R. R. Co. v. Campbell*, 36 O. S. 647. For full discussion of this subject, see *Kinhead's Code Pleading*, Sec. 402.

No. 80. Limiting common-law liability—Burden upon carrier to show loss within an exception.—You are instructed that while a common carrier is permitted by a special contract made with the owner of goods entrusted to it to restrict or limit its common-law liability so as to exonerate it from losses arising from causes over which it has no control, and to which its fault or negligence in no way contributed, it can not by such a contract relieve itself from responsibility for losses caused by its own negligence or want of care or skill, and the burden rests upon the carrier to show not only a loss within the terms of the exception, but also that proper care and skill were exercised to prevent the loss.

Graham v. Davis, 4 O. S. 362; *Express Co. v. Graham*, 26 O. S. 598; *Express Co. v. Bachman*, 28 O. S. 144.

No. 81. Not an insurer as to time—Delay caused by unavoidable accident.—You are instructed that a common carrier is not an insurer as to time, but is bound to transport goods to its destination within a reasonable time; and if delay is caused by an inevitable accident, the carrier is not responsible for any loss resulting, if it has used ordinary care under the circumstances. Under such circumstances its duty is to use all reasonable efforts to avoid all unnecessary damage to the property by forwarding it to its destination by other means of conveyance, or in some other way. If the goods are of a perishable nature and it is unable by the exercise of ordinary care to forward it to its place of destination in time to avoid a total loss, it may sell the same for the best obtainable price. If a total loss may have been prevented by sending the goods over another route, it is its duty to do so.

Express Co. v. Smith, 33 O. S. 511.

No. 82. Duty of carrier as to delivery of goods.—The jury is instructed that as a general rule, when the carrier has done all that the law requires toward effecting a delivery of the property, but is unable to accomplish it, and the property is so necessarily continued in its possession, its obligation becomes that of a depository only. He is no longer an insurer of the property, and may show that it was lost without its fault or negligence, and if the defendant shows by a preponderance of the evidence that it has done all that it could do towards delivery of the goods, and that they were lost without any fault on its part, it is not liable.

Railroad v. O'Donnell, 49 O. S. 496.

No. 83. Nondelivery of property — Presumptive evidence of loss by negligence.—Should you find from the evidence that the defendant received the property to be transported for hire as charged in the petition, then I say to you it was their duty to cause the same to be safely carried to the place of destination and deliver the same to the person to whom they were consigned, and the fact, should you so find, that these goods were not delivered is presumptive evidence of loss by negligence, and in that case the burden of proof is upon the defendants to show the exercise of due care on their part, for the law exacts of a common carrier a high degree of care. Yet if you are satisfied from the evidence that the defendant exercised all reasonable care, and that the loss, if any, was occasioned by causes over which it had no control, and not from its own neglect or omission of duty, your verdict must be for the defendant; but if you should fail to find that the defendant did exercise all reasonable care, or that the loss, if any, was occasioned by causes over which it had control, or from its own neglect or omission of duty, your verdict must be for the plaintiff.

J. L. Greene, Judge, in *Stevenson v. Wells, Fargo & Co.*

No. 84. Duty of express companies as to delivery of goods.—The undertaking of express companies is to make delivery of goods entrusted to its care for carriage to the consignee personally, with all reasonable dispatch; and to this obligation they are held by the law with great strictness. If there is delay because of some inevitable accident, it will excuse such delay, but the carrier must make delivery as soon as the impediment to the transportation of the property is removed, or can reasonably be overcome.

Railroad v. O'Donnell, 49 O. S. 489.

No. 85. Carrier of goods—Rule as to limitation of liability.—"A railroad company engaged in the business of transporting live stock assumes all the responsibilities of a common carrier. In the absence of any special contract limiting its liability, it insures against all loss except that caused by the act of God or the public enemy.

"It may limit its liability by a special contract with the shipper or consignor of the property, but such special contract can never relieve the railroad company from liability for its own negligence."

From *Kansas City R. Co. v. Simpson*, 30 Kan. 647.

No. 86. Liability by contract for loss on connecting lines.—"A railroad company may become liable as a common carrier by contract for transportation of passengers and baggage over other railroads, forming with their own a continuous line; and where they do so contract, their liability is the same for losses occasioned by negligence as fault while the baggage is upon such other road as while it is upon their own road."

From *Railroad Co. v. Campbell*, 36 O. S. 647. For law upon liability of carrier on a connecting line, see *Kinthead's Code Plg.*, Sec. 403.

No. 87. Duty with regard to baggage—Delivery, etc.—"When a railroad company takes baggage for a passenger, its liability is of the highest sort. It agrees to carry the baggage safely, and insures against all sorts of risks, except the act of God or the public enemy. But when the baggage is landed it is the duty of the owner to call immediately, or as soon as the throng and hurry incident to the arrival and departure of trains has subsided and get his property. But if he fails to thus call, and the agent of the railroad company takes charge of it, then the responsibility will be changed. It will be the responsibility of a warehouseman instead of that of a common carrier. The liability will be to take such care of the property as an ordinarily prudent man would of his own property under like circumstances. All the defendant is required to do is to take ordinary care under the circumstances, such as men usually exercise in their own concerns. The defendant is not liable for the theft of the goods unless it is the result of the want of proper care."

From *Penna. Co. v. Miller & Co.*, 35 O. S. 541. The judgment of the Common Pleas Court in the case from which the above is taken was reversed by the Supreme Court, but the latter say in their opinion, 35 O. S. p. 550, with reference to this portion of the charge, that "with the general rule thus stated we find no fault; and a less degree of care ought not, in our opinion, to be allowed." The reversal was based upon other grounds.

No. 88. Liability in absence of special contract.—"In the absence of special contract limiting the liability of the defendant, if the jury find that it is liable for loss of plaintiff's baggage, you will assess as damages the value of the trunk and such of its contents as you find was the wearing apparel of herself or her child, or their necessary or usual appendages or accompaniments of herself and child as travelers, with interest from the demand to the first day of the present term."

From *Railroad Co. v. Campbell*, 36 O. S. 647.

No. 89. Contract for transportation of vegetables.—If the defendant agreed with the plaintiffs that for a certain consideration it would carry a carload of potatoes for them from P. to R., and if, in pursuance of such agreement, the plaintiffs delivered the potatoes to the defendant for that purpose, on the — day of —, 18—, it was then the duty of the defendant to forward them to the place of delivery within a reasonable time, and without unnecessary delay, and if it failed to do so, and the plaintiffs suffered loss or damage in consequence of such unreasonable and unnecessary delay, then the defendant would be liable for such loss or damage.

Therefore, if the jury find by a preponderance of the evidence that the defendant agreed with the plaintiffs to transport a carload of potatoes from P. to R.; and further that said potatoes, under said contract, were delivered to the defendant for shipment; and if the jury further find that through the negligence of the defendant the potatoes did not arrive at their destination within a reasonable time after the defendant received them, and in consequence of unreasonable and unnecessary delay, a portion of them froze, then a *prima facie* case is made out in favor of the plaintiffs.

If the delay was not the proximate cause of the freezing, or, in other words, if the potatoes would have frozen even if there had been no delay and they had arrived at their destination in due time, then the defendant would not be liable.

I. L. DeWitt, Judge, in *B. & O. R. R. Co. v. Talbott*, S. C. No. 2718, Erie County.

See *Hewitt v. C. & C. R. R. Co.* 18 Am. and Eng. R. R. Cas. 568, where company held liable for loss of potatoes by freezing, the court holding that danger from cold was one which ordinary foresight could have apprehended and guarded against; that great diligence and despatch were required of the company in the duty of forwarding these perishable articles, and if they were exposed to the danger which injured them through the company's negligence, it is responsible for the damages. See also *Daniels v. Valentine*, 23 O. S. 532; *Canfield v. B. & O.*, 93 N. Y. 532.

No. 90. Delay in delivery of goods—Exempting liability in bill of lading.—If the defendant was guilty of any un-

reasonable delay in the delivery of the turkeys, and it was the result of its own negligence or want of care and diligence in that behalf, then it is liable for whatever damages the plaintiff thereby sustained. The defendant being a common carrier, it can not, by its bill of lading given to shippers, or in any other way exempt itself from liability for loss or damage arising from failing to deliver the goods shipped within a reasonable time, or at the time stipulated by it for delivery, if there is any such time, if the failure be the result of its own negligence or that of its agent.

No conditions in a bill of lading can bind the shipper unless where it be averred and proven by the carrier that the shipper knew of such conditions and assented to them at or prior to the time of shipment, and such assent must be proven by the carrier. The law will not presume it; and whether there was a bill of lading given for these turkeys, and the plaintiffs knew of and assented to the conditions, is a question for your determination, and the burden is on the defendant to prove these facts.

From *American Express Co. v. Hawk*, 51 O. S. 572. Charge affirmed by C. C. & S. C. As to bill of lading, see *Kinkead's Code Plg. Sec. 400*.

No. 91. Bill of lading—Effect of between carrier and shipper—Conditions in—Waiver of.—If, at the time the plaintiffs delivered the potatoes to the defendant for shipment, the receiving agent at P. Station signed a bill of lading and gave it to the plaintiffs, who accepted it and carried it away with them, such bill of lading would have all the force of a written contract between the parties, although it was not signed by the plaintiffs, and if it contained the condition above mentioned, then no right of action could accrue to the plaintiffs, unless they presented their claim for damage within ten days limitation. This condition, however, could be waived by the defendant. If the plaintiffs, exercising reasonable diligence in the premises, were unable to discover and ascertain their loss within ten days from the time of the delivery, or could not, by the exercise of diligence, determine the extent of their loss and damage within the ten days' limit, and if, after the expiration of said ten days, they presented their claim for damage to the defendant's agent, having authority to act for it, and if, at the time the claim was presented to such agent, they had knowledge of the fact that the time specified in the bill of lading, within which the claim could be presented by the plaintiffs, had expired, and if they received such claim, and proceeded to investigate it, and made no objection to its adjustment and payment on the ground

that the time within which the claim could be presented had expired, but based the refusal of adjustment and payment on other grounds, then it is the opinion of the court that such facts would constitute a waiver of the performance of said condition on the part of the defendant.

If the defendant did not waive the performance of said condition, then the plaintiffs' failure to present their written demand for damage within ten days would bar their right of recovery; but if the defendant waived it, then it is no defense to this action.

The defendant also claims that said contract contains the following provision: "And the liability of each of the carriers which shall receive these goods for transportation shall be confined to loss or damage occurring on its own line, and shall cease on delivery of the goods to the next carrier."

The plaintiffs also admit that the bill of lading contains this condition.

The defendant insists that it is exempt from liability on the ground that the loss or damage occurred while the potatoes were on the line of another railroad, to which it, the defendant, had delivered the potatoes to be carried from the terminus of its road to R.

The plaintiffs claim that the loss occurred or happened while the potatoes were in the possession of or under the control of the said defendant.

This is a question of fact, and if the jury find that the potatoes were not frozen while on the defendant's line of road, then the defendant is exempt from liability; and if, on the contrary, they find they were frozen while on the defendant's line of road, or before they were delivered to the connecting carrier, then this claim made by the defendant does not exempt it from liability.

If the jury find for the plaintiffs, they, the plaintiffs, will be entitled to recover the value of the potatoes which were frozen. That is, the market value at P. at the time they were delivered to the defendant for shipment.

I. L. DeWitt, Judge, in B. & O. R. R. Co. v. Talbot, S. C. No. 2718. See Kinkead's Code Plg., Sec. 400.

No. 92. Railroad company—Duty of, as common carrier to furnish cars for transportation.—You are instructed that it is the duty of the railroad company, as a common carrier, to furnish cars for the transportation of freight, and it must have control over its cars in order to perform its duties to the public. If persons to whom shipments of goods and merchandise are consigned might hold the cars without unloading, at

their pleasure or convenience, and without extra costs or charges, and thus deprive the railroad company of the use of its cars for the transportation of other freight, it is very evident that both the railroad company and the shipping public would suffer serious injury and loss.

Van Pelt, J., in *B. & O. Railroad Company v. Swisher*, 1 O. N. P. Rep. 122.

No. 93. Same continued—Duty of company to place cars in suitable places for unloading.—When a car arrives, it is the duty of the servants of the company to place the same in a convenient place for unloading, and if it fails so to do, the period of four days allowed by the rules for unloading does not begin until the car is placed in a convenient and proper place to unload. When a car is once placed in a suitable place for unloading, it is the duty of the servants of the company to keep it so located for the four days which are provided and allowed for unloading; and if the company fails so to do, it can not recover for car service for such car under the rule until the same is placed in a convenient place for unloading, and kept in such a place for the period of four days. In saying that the car must be placed and kept in a convenient place for unloading during the period of four days it is not meant that the car should be kept in the same spot or place on the track during all of the period of four days. If, in receiving their cars from day to day, and in removing cars that have been unloaded, it becomes necessary to shift the position of the car for freight unloading upon the side tracks of the company, such shifting or changing of position will not prevent the company from recovering for car service if the car is not unloaded within the four days, provided it is after such shifting left in a suitable and convenient place for unloading. But if the car is shifted in its position from day to day, and on some days it is in a suitable place for unloading, and on other days not, and is not at any time for the full period of four days kept in a suitable place for unloading, the company can not recover from the consignor any car service under the rule on account and because of failure to unload the car within the period of four days prescribed by the rules, but he can be held liable for car service on account of his failing to unload within that time.

But if the car is placed and kept in a suitable place for unloading for the full period of four days, and the consignor fails to unload the same within that time, he will be liable for car service after that period, although the car may not at all times thereafter be kept in a convenient place for unload-

ing, unless the servants of the company thereafter unreasonably delay him in unloading by placing the car in an unsuitable place, keeping the same there longer than is reasonably necessary to enable them to accommodate other shippers, and to receive and remove other cars in the transaction of their business. If, however, after the period of four days, the consignor is unreasonably delayed and hindered in the unloading of the cars, the company can not recover service for any day on which he is thus injured and delayed.

Van Pelt, J., in *B. & O. Railroad Company v. Swisher*, 1 O. N. P. 122.

No. 94. Same continued—Duty of company to provide side tracks.—It is the duty of the railroad company operating under such a rule or regulation, to provide at each of its stations where such rule is in force, side tracks sufficient in number and extent to accommodate its business at such station, and to enable its servants to place and keep cars accessible for purposes of unloading. And if such sufficient side tracks are not provided, and because of the want thereby, the servants of the company are unable to keep cars in places convenient for unloading for the period prescribed by the rule, the company can not recover for the car service if the car laid longer than the time allowed without being unloaded.

Van Pelt, J., in *B. & O. Railroad Company v. Swisher*; 1 O. N. P. 122.

No. 95. Same continued—May make reasonable rules concerning the car service.—It is a well-settled rule of law in this state that a railroad company, as a common carrier of freight, may make and enforce all reasonable rules for the convenient transaction of business between itself and those dealing as shippers and consignors.

Van Pelt, J., in *B. & O. Railroad Company v. Swisher*; 1 O. N. P. 122.

No. 96. Same continued—Reasonableness of rules—How determined.—Whether a particular rule or regulation is or is not reasonable in its requirements, is, when the facts are shown, a question of law for the court, and not a question of fact for the jury. You are therefore now instructed that the time allowed for unloading, that is four days, was a reasonable time, and that the amount charged (\$1.00) per day for each day over the period of four days is not excessive, and that the rule or regulation in question, if you find that such a rule or regulation is established by the evidence, was a reasonable one, and is valid in law.

Van Pelt, J., in *B. & O. Railroad Company v. Swisher*; 1 O. N. P. 122.

No. 97. Same continued—Recovery for car service—Effect of rules regulating charges for car service beyond the period allowed for unloading.—But the railroad company can recover for charges for the service of their cars beyond the period which they allow for unloading. It must show by a preponderance of the evidence that the defendant was notified or had actual knowledge of the arrival of the cars and failed to have the same unloaded for more than four days after being thus notified or learning of their arrival. If this fact is not shown as to some one or more of these cars the plaintiff can not recover; but if it is shown, then the plaintiff must go further and prove that it was operating its railroad and shipping merchandise over its lines under the rule or regulation applicable for shipments to this place, requiring those persons to whom shipments were made who, on learning of their arrival, unloaded the same from the cars within a period of four days thereafter, and that if they failed to so unload their cars within that period that they should pay to the delivering company the sum of one dollar per car per day for all the time over the period of four days so allowed for the unloading of the car.

If you should find that some time before these shipments were made the number of railroad companies doing business in this part of the country, including the plaintiff, B. & O. Railroad Company, had formed or entered into a car service association, and that such association, in order to secure the prompt unloading of cars, had adopted such rule or regulation, this would be the same in effect as if the plaintiff company had in itself adopted the same. But if you find that such rule and regulation was then in force and applicable to shipments to these places, including the shipments of coal and coke, then, if such rule or regulation was reasonable, that is, if it imposes no unreasonable burdens or restrictions upon those receiving shipments here, it was legal and valid and may be enforced by the company. . . .

If the existence of such a rule or regulation is not shown the plaintiff can not recover, for it bases its right to recover on that rule. But if the rule be shown, and also that it was applicable to shipments to this point, and that the defendants on the arrival of the cars were notified, and had obtained actual knowledge of the fact and failed for more than four days to have the same unloaded, or before plaintiff can recover it must appear that defendants had knowledge of such rules or regulations at the time, and it must also be shown by a preponderance of evidence that the cars on their arrival

were placed and kept upon a sidetrack of the company in suitable and convenient places for unloading the same by wagons and teams.

Van Pelt, J., in *B. & O. Railroad Company v. Swisher*, 1 O. N. P. 122.

CONTRACTS—BUILDING CONTRACTS.

No. 98. Construction—Words applied to trade—Contract to furnish “new dress” for paper.—It is a general rule, that in the construction of contracts language is to be given its plain, popular and ordinary signification; you are to give to the language or the words used by the parties at the time of the making of the contract, their plain, popular and usual signification, unless it appears that the words have a peculiar meaning common to a certain trade or profession. If you find that the contract is as plaintiff claims, that the words “new dress,” as used in this contract, have a peculiar meaning common only to the trade or profession of publishing and printing a newspaper, you will give to these words that meaning in considering this contract, the meaning that is common to that trade or profession, that is, the trade or profession of publishing and printing a newspaper. You will ascertain the meaning that is to be given to the words from the testimony; you are to look to the testimony and ascertain what peculiar signification these words have in that trade or profession, and in considering further, if you find the contract was made, you will give to these words the meaning as they are used in that profession or trade.

From *Gaumer v. Riley*, Supreme Court, unreported, No. 1627 (13-80). Driggs, J.

No. 99. Consideration.—You are instructed that whatever works a benefit to the party promising, or whatever works any loss or disadvantage to the person to whom the promise is made, is a sufficient consideration to support a contract. One promise is a good consideration for another promise.

It is necessary that the consideration of a promise be of some value, but the law will not enter into the question of the adequacy of the consideration, except where the inadequacy is so great as to raise the implication of fraud or imposition.

See *Judy v. Louderman*, 48 O. S. 562.

No. 100. Contracts express or implied.—Contracts are either express or implied. In general, the only difference between an express and an implied contract is in the mode of proof. An express contract is proved by evidence of the express words used by the parties. An implied contract is established by proof of circumstances, showing that either in justice and honesty, a contract ought to be implied, or that the parties intended to contract. Whether the contract be established by evidence direct or circumstantial, the legal consequences must be the same.

The inference of an implied contract is eminently a practical matter for the application of the sense and judgment of the jury, however, to be guided in that respect by our instructions to you, and the evidence, viewed in the light of all the surrounding circumstances submitted to you, and keeping in mind the fact that the written contract must prevail as to all matters concerning which they speak, unless modified by the agreement of the parties made subject to their execution and delivery.

Voris, J., in *Wilhelm v. Colohan*, Summit Co. Com. Pleas.

No. 101. Contract made under duress or compulsion.—“A contract made under compulsion may be avoided by the party by whom it was executed. Compulsion, however, to have that effect, must amount to what the law calls duress. Mere anger, or profane words, or strong, earnest language, can not constitute such compulsion as will amount to duress, or enable a party to be relieved from his contract. There may, however, be duress by threats. Duress by threats does not exist where a party has entered into a contract under the influence of the threat, or only where such threat may excite or reasonably excite, a fear of some grievous wrong, as bodily injury or unlawful imprisonment.”

From *Adams v. Stringer*, 78 Ind. 180.

No. 102. Illegal contract—Not a defense for agent as against principal.—“If the jury shall find from the testimony that, on or about the time stated in the petition, the defendant received from the plaintiff a certain sum of money under an arrangement that the same should be invested by the defendant in wheat transactions, illegal in their character, for the benefit of the plaintiff; that said money was so invested by the defendant, and a profit realized thereon; and that before the commencement of this action said sum of money and the profits so made came into and are still in the hands of the

defendant; or that he received credit therefor in the final settlement of his accounts with the brokers through whom said business was transacted, then the plaintiff is entitled to recover said money from the defendant; nor, in such case, can the defendant avoid his liability to account for said moneys by showing that, by the understanding between the plaintiff and himself, said money was to be employed in illegal transactions in wheat, of the nature stated in his answer, and that said money was employed, and said profits realized in such transactions."

From *Norton v. Blinn*, 39 O. S. 145.

No. 103. Patents—Action for royalties—Defense—Want of consideration.—The contract under which this suit is brought, in order to be binding, must be founded upon a sufficient consideration. We mean by consideration, the price, motive, or inducement that led the parties to enter the contract. The consideration for which the defendants say that they entered into the contract set out in the petition was the sale and transfer by plaintiffs to them of the exclusive right to manufacture and sell a patented invention of the plaintiff, which plaintiffs represented to be a new and useful attachment, and of great value for sewing machines, for converting reciprocating to rotary motion, for which plaintiffs had secured letters patent of the United States, and of which plaintiffs were the owners.

If you find the plaintiffs' invention to be capable of being applied to some practical or beneficial use, and is not frivolous, without regard to the degree of utility, this would constitute a sufficient consideration to support the promise of defendants to pay the royalties stipulated for. But if you find that it is not capable of being applied to some practical or beneficial use, and is frivolous, and the attachment could not be sold to the unsuspecting public without committing a fraud, and for which there could be no practical markets where its merits were known, then the transfer of the right to manufacture and sell under said letters patent would not constitute a sufficient consideration to support said promises.

Voris, J., in Kremer v. Hitchcock, Summit County Common Pleas. A patented invention which is capable of being applied to some practical or beneficial use, and is not frivolous or injurious to the well-being of society is valid without regard to the degree of its utility, and an interest therein constitutes a sufficient consideration for a promissory note or other contract. *Tod v. Wick*, 26 O. S. 370.

No. 104. Contract to maintain and provide for.—The court says to you as a matter of law that the burden is upon

the plaintiff to show by a preponderance of the proof that the defendant, S. G., failed and refused to carry out the contract in question, and refused to provide for F. G. a home in his family, and failed or refused to maintain and provide for her, suitable to her age and condition in life, boarding, clothing, care and suitable attendance when needed.

The parties are at issue upon this question, and in considering the case it would be proper to determine this question at the outset, the plaintiff insisting that he has established this fact by the evidence in the case; on the other hand, defendant earnestly denies it. It therefore becomes your duty to examine all the evidence bearing upon this question and determine what the fact is.

If the plaintiff fails to establish this question of fact, then your labors would be at an end, and you would return a verdict for the defendant. If you should find that the defendant did take F. G. into his family, and did, so long as she remained there, maintain and provide for her in all respects suitable to her age and condition, including a home in his family, boarding, clothing, care, and attendance when needed, and in all respects performed said contract on his part; and further find that F. G. voluntarily left the home of said S. G. without reasonable cause, and so made it impossible for him to continue in the performance of said contract, then, in that event, the plaintiff could not recover.

The court will say to you that upon this question as to whether she voluntarily left and had reasonable and sufficient cause for leaving, if it should appear from the evidence that some trouble arose between the decedent and the daughter of the defendant, or some member of the family, you should inquire what knowledge this defendant had of it, and to what extent, and whether or not it was a matter of frequent occurrence or just one isolated case, as bearing upon the question whether or not the defendant properly treated the decedent, and whether what occurred, if anything, afforded her sufficient cause or reasonable cause for leaving his home.

Gillmer, J., in *Watson v. Goist*, Trumbull Co. Com. Pleas.

No. 105. Same continued—What is reasonable cause for leaving?—I may say to you that reasonable cause must be such a cause as a reasonable man would say, in view of all the facts in the case and circumstances in the case, justified her in leaving his home because he was not carrying out towards her the promise of the contract, and suitably providing for her according to its terms. If she left defendant's

home for a mere whim only and for a desire only to live with her daughter, Mrs. H., or because she preferred rather to live with her than at Mr. G.'s, or even from persuasion on the part of Mrs. H., and had no other reason for leaving, and you further find that the defendant performed his part of the contract while she remained in his family, and was still ready and willing to perform it, then I say to you that this would not be a sufficient cause for her leaving.

Gillmer, J., in *Watson v. Goist*, Trumbull Co. Com. Pleas.

No. 106. Action upon contract for support of parent.—

This is an action for the support, maintenance, care, nursing, etc., of the mother-in-law of the plaintiff in this cause; the old lady cared and nursed was the mother of the plaintiff's wife.

While a child may be morally bound to care for, support, and maintain a mother, who, through the long and weary nights or days, has nursed the child during its infancy and childhood, yet no such legal obligation rests upon him. In other words, a child is not bound to support and maintain a parent in his old and declining days.

Therefore, primarily, neither S. W. nor his wife, M. W., was bound to support, maintain, and care for this old lady in her declining years; primarily, M. C. was bound to pay the plaintiff in this case for the services rendered to her during her declining years, and there can be no recovery in this case against the defendant, unless the plaintiff has satisfied you by a preponderance of the evidence that the defendant, W. C., did promise to pay the plaintiff for the care, sustenance, nursing, and support of M. C., and that by reason of this promise made by the defendant, W. C., he, the plaintiff, did care for, nurse, support, and maintain M. C.

If the plaintiff has satisfied you by a preponderance of the evidence that the defendant did promise to pay for the support, maintenance, and care of this old lady, and that by reason of that promise he, the plaintiff, did support, maintain, nurse, and care for her, your verdict will be for the plaintiff, as to this issue; but if the plaintiff has failed to satisfy you by a preponderance of the evidence that the defendant did promise to pay for the support, care, nursing, and maintenance of this old lady, and that in pursuance of that promise, he did perform those services, your verdict must be for the defendant, and your duties will then be at an end.

I may say here that no particular form of words is necessary to constitute a valid and binding contract, and add that if a

promise is made upon one side, and entered upon and acted upon by the other, this will be sufficient to make it a binding contract.

In other words, it is not necessary, if one of you should make a promise to pay for a particular service, that I should say to you in a certain form of words that I will accept your proposition; it is enough if, after you have made the promise to me, I enter upon and perform the services for which you agreed to pay. In such case, if the minds of the two parties actually come together at the time the promise was made, and the services were performed in consideration of that promise, this will be sufficient to make it a good, binding, and valid contract.

If, therefore, you find that this promise was made by W. C., and that S. W. accepted it, and that he performed the services, or that they were performed by his wife and children (under the restrictions that I shall hereafter speak of), and that he has not been paid for them, the plaintiff would be entitled to recover the reasonable and fair value of the services so performed by him, his wife, or his daughter, and for the value of the board and clothing and medical attendance that was furnished by him.

From *Wm. H. Campbell v. Woodward*, Sup. Ct. No. 2834. Judgments affirmed. *Joseph W. O'Neill*, Judge.

No. 107. Building contracts—Deviation from written—Recovery for extras.—It being admitted by both parties that written contracts were entered into between them, these should control so far as applicable to the matters in contention, except as you find that they have been modified by the mutual consent of the parties.

Any substantial variation or departure in construction or material from that provided for by the terms of the written contract, unless made with the consent and approval of the defendant, though it made the completion of the job more expensive than provided for in the contract, would not constitute such extras as would entitle the plaintiff to recover therefor.

To enable the plaintiffs to recover for extra expenses by reason of deviations from the plans stipulated for in the contract, it must appear that the same were made, and with the authority of the defendant, either express or implied, and under such circumstances that implied that he should pay therefor. . . . If you find from a preponderance of the evidence, and guided and limited by these instructions to you, that such extra work and material were furnished, and if you

also further find that the defendant became obligated to pay therefor, as herein defined and limited, then whatever extras the plaintiffs did so actually provide would constitute a valid claim, to the extent of their reasonable value, at the time and place they were applied, unless the price for such modifications were expressly agreed upon, in which case the express agreement should prevail.

If anything was omitted or changes were made to an inferior and less expensive mode of construction than stipulated for in the contract, the defendant would be entitled to have the value of the omitted material and the difference in the value of the less valuable material from that contracted for deducted from any balance due the plaintiffs on the contract, unless substitutions were made of other materials or work in lieu thereof by the authority of the defendant, and which were considered by the parties as an equivalent therefor. To the extent the parties agreed upon such omissions or substitutions you may consider the contract modified, and in adjusting balances, allow or deduct what the evidence shows would be reasonable, having reference to the stipulations of the contract in that respect, unless you find these matters to have been agreed upon by the parties as to price, in which case the agreement should prevail.

Voris, J., in *Wilhelm v. Colohan*, Summit Co. Com. Pleas.

No. 108. Same continued—Claim that work not done in workmanlike manner.—If, in respect to any of the matters alleged in the defendant's answer, the plaintiffs did not do their work in a workmanlike manner, and according to the stipulations of the contract, then the defendant would be entitled to have such difference in value deducted from the contract price, unless you find that the defendant accepted the same as a compliance with the contracts, or settled therefor as herein qualified. We include in this instruction those matters agreed upon though not included in the written contracts.

Voris, J., in *Wilhelm v. Colohan*, Summit Co. Com. Pleas.

No. 109. Same continued—Performance or compliance.—If the plaintiffs fully performed their part of the contract, then they would be entitled to recover the full price contracted for, less payments actually made.

But if the plaintiffs substantially complied with the contract except in some slight deviations, they would be entitled to recover the contract price, less the diminution in value to

the owner on account of the deviations; or what the house was actually worth less on account of these departures.

Voris, J., in *Wilhelm v. Colohan*, Summit Co. Com. Pleas.

No. 110. Same continued — Unfinished work.—As to unfinished work, if any, the plaintiffs are entitled to recover the balance due at the contract price, less such sum as it would require to construct or complete the unfinished parts. And any reasonable expense made necessary by being compelled to procure such completion.

Voris, J., in *Wilhelm v. Colohan*, Summit Co. Com. Pleas; 26 O. S. 101.

No. 111. Same continued—Acquiescence by owner in work not according to contract.—If the work was not according to the contract and you find that the defendant stood by and saw them prosecute the work without objection, and was benefited by the labor and materials, the plaintiffs would be entitled to compensation to the extent of such benefit; that is, what the same were reasonably worth, but not to exceed the contract price. Or, when the same was completed, but lacking in quality, the contract price is to be reduced by the difference in the value of the work as it would have been by the contract and as it actually was.

Defendant is entitled to have his contract, in its true spirit and intent, substantially executed, except as its terms have been waived by C., or his duly authorized agent in the premises, and any failure on the part of plaintiff to so perform entitles defendant to reduction of the contract price to the extent the same was rendered thereby less valuable than contracted for, unless defendant being advised in the premises, knowing the material facts, accepted the buildings as a performance of the contracts, or settled therefor as herein defined and qualified.

Voris, J., in *Wilhelm v. Colohan*, Summit Co. Com. Pleas.

No. 112. Same continued—Acceptance of building.—The fact that the defendant had bills rendered from time to time to him, and was present as the work progressed, paid money from time to time, went into possession of said house and barn, the knowledge he had of and concerning the same, what he said and did concerning the character of the work and material are circumstances from which you may infer whether he had or had not information as to the modifications from the contract, character of the work, extras, material, quality, and price thereof, and whether he did or did not assent to, or accept the same, or settle therefor.

Voris, J., in *Wilhelm v. Colohan*, Summit Co. Com. Pleas.

No. 113. Same continued—Settlement—Conclusive in absence of fraud.—We hold that if the parties got together and fully settled the matters growing out of said building transactions, the same would conclusively bind the parties, in the absence of fraud or mistake. But if you find by a preponderance of the evidence that the defendant acted with reasonable prudence, and in good faith, and relied upon the representations of the plaintiffs and was deceived thereby, and by reason thereof agreed upon a settlement he would otherwise not have made, he would not be bound thereby. And we further say to you that the defendant acting in good faith and not knowing to the contrary, would be entitled to rely upon the representations of plaintiffs made to him in that behalf.

If you find a settlement, as defined and limited by our instructions to you, was actually entered into by said parties, and that it was a part of said contract of settlement, that plaintiffs promised the defendant that if said work had not been in fact done and performed in accordance with the representations and said contracts, that plaintiffs would on request of defendant return to said buildings and do all things required, in order to make the work as represented by plaintiffs, and as required by said contracts, then it would be obligatory upon defendant to make such request within a reasonable time, and what would be a reasonable time we leave for you to say from the evidence submitted to you, before defendant would be entitled to a reduction for failure to return to said buildings and do all things required in order to make the work as represented by plaintiffs, etc.

But this instruction to you must be taken as qualified and limited by the instruction we now give you.

If you further find from a preponderance of the evidence that said representations by plaintiffs were false and untrue as to the state of said work and material, that in substantial particulars the work had not been performed in accordance with the terms of said contracts, that the said extras so as aforesaid charged for were estimated both in quantity and value greatly in excess of the amount actually done, or of the value of that which was done, and that the defendant relied upon such representations and promises, and not knowing to the contrary, and defendant thereafter requested the plaintiffs to return to said work and complete the performance thereof, as required by said contracts, and the plaintiffs neglected, and ever since have neglected so to do, or you find that the parties did not settle as herein defined the promise of the defendant to pay said balance would not be binding on him.

No. 114. Action for recovery of extras in a building contract.—That you may determine the matters at issue between the parties, you will look into the evidence and find what work and material the written contract entered into for the construction of the building required to be done. After you have ascertained that, then you will inquire whether or not the plaintiff did anything at the request of the defendant towards the construction and completion of the building, other than that agreed to be done in the written contract. If you find that work was done other than that or outside of that provided for in the written contract, then you must ascertain what it was reasonably worth. Any substantial violation or departure in the construction of the building from that provided for in the terms of the written contract, if made at the request of the plaintiff and which made the completion of the work more expensive than that provided for in the written contract, then that would constitute such extras as would entitle the plaintiff to recover therefor to the extent of the reasonable value of the extra work and material so supplied at the request of the defendant. If you find that this extra work was done by the plaintiff at the request of the defendant and that there was no special or other contract, it should be paid therefor, you are instructed that the law implies a contract on the part of the plaintiff that he will pay the defendant such an amount as the work is reasonably worth.

Voris, J., in *Wilhelm v. Colohan*, Summit Co. Com. Pleas.

DEATH BY WRONGFUL ACT.

See also Negligence.

No. 115. Action for damages for death by Homicide.—“It is to be observed that this case is to be tried in the same manner, and it is to be governed by the same principles of law, as if the deceased had not died of the injuries, and had commenced an action for the recovery of damages for these injuries, or in other words, that this action can be sustained under such state of facts only as would have entitled the deceased, had he lived, to have maintained an action, and recover damages for the injury which caused his death.”

“If, for instance, the deceased had been wounded, and had not died of his wounds, and had brought an action against

the defendant for damages, if it appeared that deceased made the first assault, and this defendant repelled it by force, employing no more force than was necessary to protect himself, the plaintiff (deceased) could not recover; but if the defendant went unnecessarily beyond this, and employed force entirely disproportionate to the attack, such as to show wantonness, malice, or revenge, he himself would become a wrongdoer and would be liable for injuries inflicted beyond what was reasonable and necessary."

From *Darling v. Williams*, 35 O. S. 58. The case from which this is taken was not one of negligence, but of intentional killing. The defendant denied the charge, and alleged that all he did was done in self-defense. This allegation the plaintiff denies, and upon these issues the case was called to trial. There was no appearance that the defendant's liability arose from negligence. The injury was the outgrowth of a fight or affray. Had the deceased survived and brought an action for the injury, it would have been an action for assault and battery. In such action the law governing cases of negligence, would have been entirely inapplicable. *Darling v. Williams*, supra.

No. 116. Same continued—What is excusable homicide.—It seems to be now well settled that to justify the taking of the life of an assailant in an attack, there must appear to the satisfaction of the jury, first, that the defendant, if assaulted without any wrong or cause on his part, honestly and truly believes that he is in imminent danger of his death, or of great bodily harm; and if, secondly, he has just and reasonable cause to apprehend such danger, which he can not avoid without taking the life of his adversary, it is excusable.

Darling v. Williams, 35 O. S. 58.

No. 117. Same continued—Right of self-defense.—That every person has the right to defend himself against attacks, or threatened attacks, of such character as would endanger his life or limb, or to do him great or serious bodily harm or injury, even to the taking of the life of the assailant; and where a person apprehends that another is about to do him great bodily harm, and has reasonable grounds for believing the danger imminent, he may safely act upon such apprehension and even kill the assailant, if that be necessary, to avoid the apprehended danger.

That the necessity which permits in law, the taking of life in self-defense, may be either apparent or real. It is real when there is actual danger to life, or great bodily harm; it is apparent, when the circumstances, at the time of taking life, to a reasonable mind, indicated the presence of actual danger to life, or great bodily harm, though there is in fact none.

Darling v. Williams, 35 O. S. 58. "One person can justify the taking of the life of another in self-defense, only where, in the proper exercise of his faculties, he believes in good faith, and upon sufficient or reasonable grounds of belief, that he is in imminent danger of death, or grievous bodily harm." *Id.*; *Marts v. State*, 20 O. S. 162.

"It is not, however, necessary that the danger should prove real or in fact existing, for whether real or apparent, if the circumstances are such as to induce a belief sufficiently well grounded, that life is in peril, or that grievous bodily harm is intended; and to be threatened with a danger, he may act upon appearances and slay his assailant. Yet there must be reasonable ground for his belief in the danger threatened, arising out of the circumstances in which he is placed, otherwise the act of taking the life of the assailant is entirely without justification."

Darling v. Williams, 35 O. S. 62, *Boynton, J.*

DEEDS.

No. 118. Deed—Execution of, under duress.—"To constitute duress which would avoid the deed, it is not necessary that the threats be of legal injury alone; but if the plaintiff, the wife of T., was induced to execute the deed by the threats of her husband, that he would separate from her as her husband and not support her, it is duress and will avoid the deed.

"The threats must be such as she might reasonably apprehend would be carried into execution, and the act must have been induced by the threats. It is not necessary that the threats be made at the time or immediately before signing, if it was within such time, and the circumstances satisfy you that the threats or their influence properly conduced to influence the plaintiff."

From *Tapley v. Tapley*, 10 Minn. 458; citing 2 Greenlf. Ev., Sec. 308; 1 Story Eq. Jur. Sec. 719.

No. 119. Deed—Capacity to make—Declarations of grantor.—"The court says to you that no general rule can be laid down as to what constitutes undue influence in this class of cases further than this: that in order to make a good deed the man must be a free agent and feel at liberty to carry out his own wishes and desires; and any restraints, threats or intimidations brought to bear upon the grantor, which he

has not the strength of mind or will to resist if exercised so as to coerce him against his desire and purpose in the making of the deed, is undue influence within the meaning of the law. And the amount of undue influence which would be sufficient to invalidate a deed may vary with the strength or weakness of the mind of the vendor; and the influence which would subdue and control a mind and will naturally weak, or one which had become impaired by age, disease or other cause, might have no effect to overcome a mind naturally strong and unimpaired. And whether such undue influence existed in this case must be determined by the jury from the consideration of the evidence. . . .

Evidence of the declarations of the vendor at times other than the time the deed was made, and instances occurring at times other than the said time, are competent as tending to show the kind of a person he was, and also to show the state of his mind, its strength or weakness, its susceptibility to influence or its capacity; and these declarations are admitted simply as to the external manifestations of the vendor's mental condition and not as evidence of the truth of the facts he states.

Gillmer, J., in *Norris v. Western Reserve Seminary, Trumbull Co. Com. Pleas.*

No. 120. Covenant against encumbrances—Breach—What constitutes—Damages recoverable.—As a matter of law, if you find the deed was duly executed and that there was the outstanding mortgage unsatisfied at the time of the execution thereof, that, even if nothing had been done beyond that, would constitute a breach of the covenant against encumbrances which would entitle the plaintiff to recover nominal damages only. But if the person, if M., the grantee in the deed, was obliged to pay anything beyond that, or anything for the purpose of removing the encumbrances, then, to that extent, or whatever he may have paid, he would be entitled to recover in this case.

If the encumbrance existed at the time of the execution of the deed, the breach of the covenant occurred at the time the deed was executed, and the grantee would be entitled to recover for whatever amount was outstanding and a lien against the property at that time, with interest upon it from that time up to the first day of this term, provided he was obliged to pay it, or if it was paid out of the proceeds of his land on which that was found to be a lien, no matter whether that proceeding was instituted by the party holding the lien or somebody else; or if you find in this case that proceedings

were instituted and money was paid, and that amount is all that was in dispute, it is necessary that you, by the testimony, should find the amount the party was obliged to pay, or what was paid on this outstanding claim out of the proceeds of the land of M.; to that amount he would be entitled, with interest upon it up to the first day of this term.

If you find he sustained any other damage in consequence of this outstanding lien, if you find he was damaged in other ways, directly, and there is direct and positive proof upon the subject that he was otherwise damaged, then you may take into consideration other damage, if any, which he may have sustained and which are clearly shown by the proof in this case. But if not, you should return a verdict, if you find this was not so paid, then you should return a verdict for the defendant; but if you find it was paid out of this fund, you should return a verdict for the plaintiff, and your verdict should be for the amount which was found by the court at the time the proceedings were had to foreclose this mortgage, and which was found by this court to be a lien on this property. If that amount was paid, he would be entitled to recover at your hands that amount with interest upon it to the first day of this term, from the time of such payment.

From *Marlow v. Thomas*, Supreme Court, unreported, No. 1918. By Johnston, J., in *Mahoning Co. C. P.* A covenant against an incumbrance is broken as soon as an incumbrance in fact exists, at least for nominal damages. *Kinthead's Code Pleading*, Sec. 480; *Hall v. Plaine*, 14 O. S. 417; *Rawle on Cov.* (5th ed.) Sec. 70 and cases cited. An action for nominal damages may be maintained even without eviction. *Stambaugh v. Smith*, 23 O. S. 584.

The measure of damages for a breach of a covenant against incumbrances is the amount which would be required to be paid to extinguish the incumbrance, also any consequential damages directly resulting from the existence of the incumbrance. *Wood's Mayne on Damages*, Secs. 259 and 260; *Delaverger v. Norris*, 7 Johns. 358; *Hall v. Dean*, 13 Johns. 105; 2 Wheat. (U. S.) 45; *Rawle on Cov. of Title*, Sec. 86; *Kinthead's Code Pleading*, p. 450, note.

EJECTMENT—ADVERSE POSSESSION.

No. 121. What constitutes adverse possession. — The period of prescription in Ohio, by which one acquires an easement or title in land, is twenty-one years. This is called adverse possession, and what constitutes adverse possession is a question of fact for the jury to decide under proper instructions by the court.

Tootle v. Clifton, 22 O. S. 252-3.

It is not necessary to constitute adverse possession, that a person shall merely be in possession for a period of twenty-one years, but there are certain requisites that must accompany that possession, which will now be explained to you. The fact of possession *per se*, is only an introductory fact to a link in the chain of title by possession, and will not simply of itself, however long continued, bar the right of entry of him who was seized, and, of course, creates no positive title in any case. The reason of this is, that it may have been possession with permission; and if the person in possession has offered to purchase the title of another claimant, it will not be adverse. To have the effect of creating title by adverse possession, the possession must not only have been actual, exclusive, open, and notorious, *with claim of title*, but it must also have been adverse during the whole period of twenty-one years. It is not necessary, however, that the party should live on the land, but only so he exercises absolute control over it. To constitute adverse possession, there must have been an intention on the part of the person in possession to claim title, or he must have claimed it as against others, by declarations or acts, that a failure of the owner to prosecute within the time limited, raises a presumption of an extinguishment or a surrender of his claim.

Lane v. Kennedy, 13 O. S. 46-7; Humphries v. Huffman, 33 O. S. 395.

No. 122. It need not be held under color of title.—It is not an essential of the title acquired by adverse possession, that the party should have entered under color of title, nor that the possession be held under color of title. Where there is possession of the requisite character, the question, whether there is color of title or not, is wholly immaterial.

(Lessee of Paine v. Skinner, 8 O. 167; Yetzer v. Thoman, 17 O. S. 130; McNeeley v. Langan, 22 O. S. 37.)

It is the visible and adverse possession, with an intent to possess, that constitutes its adverse character, and not the remote motives or purposes of the occupant.

French v. Pearce, 8 Conn. 439; Humphries v. Huffman, 33 O. S. 402.

No. 123. Meaning of continuous possession.—In order that it will constitute continuous possession, you are instructed that it is not essential that it shall be continuously held and possessed by one person. That is, the possession will descend to the heir of the possessor, without interrupting the running of the statute. It is sufficient that the possession during such period was in the party claiming or those under whom he

claims; and, as to third persons against whom the possession was held adversely, it is immaterial, if successive transfers of the possession were in fact made, whether such transfers were by will, by deed, or by agreement, either written or verbal.

McNeeley v. Langan, 22 O. S. 32.

No. 124. Ejectment—Adverse possession—Occupation must be of some well-defined limits.—Now I say to you on that point that the law provides that when there is continuous, uninterrupted, open, notorious, and adverse possession of land by a person for twenty-one years or more, such person has a right to the possession thereof; it operates to convey a complete title as much as any written conveyance, and extinguishes the right of possession to any other, although holding the paper title. By these terms, continued, uninterrupted, is meant, it must not have been abandoned or lost during the twenty-one years; by adverse is meant a possession in opposition to the legal title and real owner, and the occupation must be by some well-defined, certain limits, indicated by a substantial and real inclosure or something of a like notorious character. It must be such as leaves no doubt as to what is included and as to what is intended as the limits. The kind of possession described is what defendant must satisfy you of by a preponderance of testimony; that he or those from whom he derives title had had for twenty-one years or more; if he has done this, he is entitled to a verdict at your hands.

Noble, J., in *France v. Dexheimer*, Sup. Ct. No. 1896, Cuyahoga Co.

No. 125. Adverse possession—Lines between owners.—Although the line between these two lots may by mutual mistake be laid different from the lot line, each being bounded by the lot-line in their deeds, if they or those from whom they claim title respectively occupied up to and acquiesced in the wrong line for a period of twenty-one years or more, the possession of each being open, notorious, continued, and exclusive, that line will be the true line between them.

The issue to be determined by you between the parties is, in the first place, where is the lot-line between these parties, and the burden of proof is upon the plaintiff to satisfy you by a preponderance of testimony that it is where she claims it is, and she must establish her right to it independently of any weakness of the defendant's title. She must sustain her right to the strip of land by testimony which places it in her independent of anyone else.

It is for you to say, gentlemen of the jury, under all the testimony of the case, who is entitled to this strip of land under the rule of law I have given you, what is the true lot-line. If the plaintiff is right as to its location, what is the fact as to another line being established and acquiesced in by the parties and those from whom they claim title, what do the neighbors who have been acquainted with it twenty-one years tell you about the original location of the fence spoken of and as to its remaining in the same position substantially ever since? What light does the testimony as to the position of trees and surveyor's marks and monuments throw upon it? Do they indicate it has remained as it was or that it has been changed from time to time and the line altered in some parts. All the testimony should have its proper weight with you in reaching a conclusion.

Noble, J., in *France v. Dexheimer*, Supreme Court, No. 1896, Cuyahoga Co.

No. 126. Abandonment — What constitutes. — “The question of abandonment is one of fact and intention. Ceasing to cultivate a common field and a removal elsewhere do not make an abandonment; but to constitute an abandonment by the party it must be shown that he quit the property with the intention of no further claiming same, and the burden of showing the abandonment rests upon the one who sues.”

From *Tayon v. Laden*, 33 Mo. 205.

No. 127. Adverse possession—Must extend to what. — “Where a party enters upon land without a deed or other paper title containing specific descriptions of the land by metes and bounds, or without color of title to the premises, claiming to hold them adversely, his possession only extends to that part of the tract actually improved and occupied by him, and his entry in such case, upon a part of the premises, does not give him adverse possession to uninclosed and unimproved woodland.”

From *Humphries v. Huffman*, 33 O. S. 395.

No. 128. Mistake in boundary line—Nature of occupancy.—Where one of two proprietors respectively of adjoining lines holds actual, notorious, continuous, and exclusive possession up to a certain line, though not originally the true one, for a period of twenty-one years, the statute of limitation applies in his favor, and against the adjoining proprietors, although such possession might have grown out of the mutual mistake of the parties respectively, in respect to the locality

of what was originally the true line between them. Then I say to you as matter of law that if you find from the evidence in this case that the plaintiff and those under whom he claims to have had actual, continuous, and exclusive possession of the land described in the petition, or any portion thereof, for a period of twenty-one years before the commencement of this action, he acquired title to the land so occupied as against the defendant and every other adult person.

The occupancy necessary to acquire title by possession is such occupancy and use of land as the nature of the particular land would require. If it is a farm, the occupancy would have to be such as a farmer would occupy, either by plowing, pasturing, mowing, or in such other ways as a farmer would usually use land. If it was city property, the occupancy must be such an occupancy as is usual for city property. . . . It will be important for you to determine from the evidence where the true line between the lands claimed by the plaintiff and the lands claimed by the defendant was. This is a question of fact for you to determine under all the evidence in the case. It will be important for you to determine whether the defendant has occupied any of the land described in the petition or not, and if he has, to what extent and how much of it he has occupied.

Nye, J., in *Edison v. Ranney*.

No. 129. Ejectment—Declarations as to ownership.—

Some evidence has been permitted to be given to you by the defendant as to what R. did and said while the owner was in possession of the lands now claimed by the defendant, by way of pointing out the boundaries of said land. This testimony was permitted to be given you for the purpose of showing where R. claimed his north line was, while he was such owner and in possession of the land which he thus claimed to own. His statements and acts should be given such weight as the statements and acts of owners of lands generally, and no more. If you find from other evidence that the line which the said R. pointed out and stated as his northerly line was not the true line, then you should disregard the line which he pointed out and adopt the one which you find to be the true line between the lands claimed by the plaintiff and the lands claimed by the defendant.

Nye, J., in *Edison v. Ranney*.

ELEVATORS.

No. 130. Elevator—Damages for injury—Who liable for—Owner or lessee.—“If the plaintiff was in the employ of the lessees of the elevator at the time of the injury, and had been ever since the building in question was erected, and the firm had had the entire and exclusive use and occupancy of the building in question, and of the elevator, during all that time, the defendant (the owner) having no right to use or occupy any of it in any way, the plaintiff can not recover.”

“The fact that there were boilers and engines in an adjoining store, which created the power to run the elevator in question, and heat for the store and two other stores just like it; and the defendant hired the engineer and paid for the running of it and the fuel, upon the agreement contained in the lease that the lessees should pay for all such services, did not give the use of any portion of the building or elevator in question to the defendant or deprive the lessees of the exclusive occupancy of it.

From *Sinton v. Butler*, 40 O. S., 158.

No. 131. Injury from elevator—Negligently constructed—Duty of owner.—If you find that the elevator was negligently constructed, without proper railings or other safeguards, to protect persons coming into the store to transact business of the kind done there, and it so remained up to the time of the accident, and that this was the proximate cause of the injury to the plaintiff, and you further find that the plaintiff was in the exercise of ordinary care, giving reasonable attention to his business that brought him there, and under these circumstances he fell into the elevator hole and received the injury, then in that case the defendant would be liable.

It was the duty of the defendant as owner of the elevator to so use it in his storeroom, and to so guard the opening in the floor, and to keep the rooms reasonably safe for those going therein to transact business. And if the plaintiff went into the room on business, he had the right to assume that the defendant kept such storeroom and used such elevator in a proper manner. . . . And if you find that the plaintiff proceeded when in the store with reasonable attention to the business that took him there, and acted as a man in the exer-

cise of ordinary care and under like circumstances would have acted, and that he fell into the elevator hole, and you further find that the elevator hole was not properly guarded by suitable railings or otherwise, and that this was the proximate cause by which the plaintiff received his injuries, and the plaintiff was not guilty of contributory negligence, then he is entitled to recover against the defendant. . . .

The defendant had a right in the management of his business to maintain an elevator in the building, and it is a matter of fact for you to determine from all the evidence in the case whether at the time the plaintiff went into the store and met with the accident, that the defendant was guilty of negligence in regard to the construction and use of the elevator. . . . If you find from the evidence that the defendant was negligent in using the elevator, and in leaving the hole open without any railing or guard, at the time the plaintiff fell into it and received the injury complained of, then you will inquire further whether the plaintiff himself was negligent in walking into the hole, and in your inquiries in this behalf you will take into consideration all the evidence in the case; the distance the elevator was from the front of the store, the distance the plaintiff had to travel in going from the front of the store to the elevator-shaft, whether or not there was light sufficient so that the plaintiff could have by the use of ordinary care seen the open elevator-shaft hole.

It was the duty of the plaintiff to exercise ordinary care to avoid danger, and if you find that in the exercise of ordinary care he could have discovered the elevator-shaft and avoided the danger, then the plaintiff can not recover.

Gillmer, J., in *Kingsley v. Stiles, Trumbull Co. Com. Pleas.*

EMBEZZLEMENT.

No. 132. Embezzlement—Venue where laid — Depending upon where intention to commit is formed.—“If you find that the defendant received and had this money in his possession in H. County, and while it was so in his possession in H. County, he formed the intention—the purpose—to appropriate the money to his own use, and in pursuance of that purpose, so formed in H. County, he did appropriate the same to his own use, either by expending the same in S. County or any other county or place, or if he did not

expend it, but in pursuance of such intention so formed in H. County, he kept the money in his own pocket with the intention of permanently depriving his employers and the owner thereof of said money, and, upon demand, with that intention, refused to pay it over, then in either case the crime would be committed in H. County. But if he received and had the money in his possession in H. County and carried the same into S. or any other county, and then for the first time formed the purpose to appropriate the money to his own use, and in pursuance of such intention he did appropriate the same to his own use in such county, then the crime would not have been committed in H. County. If the defendant formed the purpose in H. County to convert the moneys or any of them mentioned in the indictment, but did not in fact convert them or any of them in H. County, he can not be convicted of embezzlement in this county."

From *Campbell v. State*, 35 O. S. 70.

No. 133. Embezzlement by treasurer of board of education.—Embezzlement by a public officer is a fraudulent appropriation to his own use of the money or goods entrusted to his care by virtue of his office. Embezzlement by a public officer as applied to this case, is an unlawful and fraudulent appropriation to his own use of the money entrusted to his care and held by him as such officer. It then becomes important for you to determine from the evidence whether the defendant unlawfully and fraudulently converted to his own use the sum of \$——, or any part of all the public money of the board of education of —— Township, which came into his hands as treasurer of said board of education. In determining that question it will be proper for you to consider the manner in which he kept the money, the place where he kept it, what he did with it, if anything, and all the other facts and circumstances given you in evidence.

Nye, J., in *State v. Wideman*, Medina Co. Com. Pleas.

No. 134. Embezzlement by treasurer of board of education—Deposit of funds in bank which fails.—Some testimony has been given you tending to show that the defendant kept his money in the exchange bank of S. At the time it is claimed that the defendant committed the offense charged in the indictment in this case, it was made unlawful by statute for a township treasurer to deposit with any company, corporation, or individual, any portion of the public money held by him as such treasurer.

And you are further instructed that at that time there was no authority or law whereby the defendant as treasurer of the board of education of — Township, was authorized to deposit the public money belonging to the said board of education in any bank.

But in this proceeding the defendant is not charged with unlawfully depositing said money in said bank. You are, therefore, instructed as matter of law, that if you find from the evidence that the defendant did deposit said money in said bank, and the same remained there until after the bank went into the hands of a receiver, and the said defendant did not use and convert to his own use any portion of said money, **he could not be found guilty in this indictment.**

But if you find from the evidence that the defendant used and converted to his own use the money described in the indictment, or any portion thereof, he would be guilty of embezzlement for such amount of money as he so used and converted to his own use.

Nye, J., in *State v. Wideman*. See R. S. Secs. 6841, 7299.

No. 135. Same continued. — Using funds intending to repay.—The crime charged in this indictment consists in the embezzling, and in converting to his own use, the public money described in the indictment. If you find from the evidence that the defendant unlawfully used and converted to his own use the money described in the indictment, or any portion thereof, intending to replace it, the mere fact that he intended to replace it would not exonerate him from such unlawful taking, using, and converting to his own use any of the public money which came into his hands as treasurer of the board of education of — Township; and if he did convert to his own use any of the money named and charged in the indictment in this case, which came into his hands as treasurer of the board of education of — Township he would be guilty of embezzlement of as much of the said money as he thus converted to his own use.

Nye, J., in *State v. Wideman*, Medina Co. Com. Pleas.

EMINENT DOMAIN—APPROPRIATION OF PROPERTY.

No. 136. Appropriation for right of way for railway purposes—Right to—Constitutional provisions.—The P., P. & F. Railway Company, the plaintiff in this proceeding, filed its petition herein to appropriate to its uses and ownership the premises described therein, and which you have already been upon and examined. It is the right of the plaintiff to take this land, but before this can be done the value thereof must be found and paid in money.

The constitution of our state provides that no right of way shall be appropriated to the use of any corporation until full compensation therefor be first paid in money, or first secured by a deposit of money to the owner, irrespective of any benefit from any improvement by such corporation, which compensation shall be ascertained by a jury of twelve men in a court of record, as shall be prescribed by law.

Geo. H. Shepard, Probate Judge. Approved in P., P. & F. Ry. Co. v. Paine by C. C. and S. C., S. C. No. 3024.

No. 137. Same continued—Assessing compensation—Rules for.—By reason of the provision of the law, made under this clause of the constitution, you have been summoned, empaneled and sworn to render full compensation to this defendant for the land sought to be taken from him in this proceeding. The only duty then devolving upon you in this case is to ascertain and declare by your verdict, how much money will make full compensation to this defendant for the premises described in the petition, and which are sought to be taken by the plaintiff. We say to you that the premises sought to be appropriated extend to the center of the river, subject to the rights of the public to use the river.

We say to you that full compensation, in this case, means the fair cash market value of this land as it is at the present time and as you viewed it, without any regard to the causes that may have contributed to make up its value.

By fair cash market value is meant as much as the owner might fairly expect to be able to sell it for to others, if it were not taken by the plaintiff. Such a price as it would bring if put in the market. Not what it would bring at a forced sale, or under peculiar circumstances, but such sum

as it would bring in the market, that is to persons generally, if those desiring to purchase were found who were willing to pay its just and true value. We say to you that the necessity of the plaintiff to have these premises, nor the unwillingness of the defendant to part with them should have no consideration in arriving at your verdict. Neither of these constitute any element of market value. It is the market value as contradistinguished from any special value to the plaintiff, or any other corporation or to any individual. You should consider the location of the premises in question, the best purposes for which they are or may be used, their surroundings, their present condition, with reference to arriving at fair market value. If you find that these premises have any special value, for any purpose, whether it is for the purpose for which it is now used or for any other purpose, which affects its value in the market, you may take that into consideration. You are under no obligation to consider the bare value of the land, with the value of the filling and docks thereon added. The value should be considered with reference to the value as a whole as it is there now, for the best purposes to which it may be applied. The nature and condition of the harbor on which these premises are located, the business done on the premises and in the locality, nature of the improvements on this land, its general availability, may be considered by you in your deliberations.

The value is to be estimated, having regard to the existing business and wants of the community, or such as may be reasonably expected in the near future.

Geo. H. Shepard, P. J. Approved in *P., P. & F. Ry. Co. v. Paine*, by Circuit and Supreme Courts.

We think a more full explanation might be given the jury as to what kind of compensation is contemplated by the constitution, and so the following is appended.

Note on Allowance of Benefits.

The jury must consider the real value of the realty, may take into account not only the present purpose to which the land is applied, but also any other more beneficial use to which, in the course of events, at no remote period, it may be applied. 30 O. S. 111. It is the actual as distinguished from the speculative loss that must guide the jury. The jury must consider the real value of the land taken, the diminished value of the remainder, and may for that purpose take into account, not only the purposes to which the land is or has been applied, but any other beneficial purpose to which it may be applied, which would affect the amount of compensation or damages. 30 O. S. 108. That is what is said in the *Longworth* case (30 O. S. 108), and would seem to permit benefits from the proposed work to be taken into consideration in estimating the compensation or damages to be awarded. In 9 W. L. B. 253, and in 29 W. L. B. 260, it is held that special benefits can be considered so far as to offset damages to property remaining; that special benefits may be considered.

This matter is regulated by constitutional provisions, Art. 1, Sec. 19, and Art. 13, Sec. 5, the first requiring compensation to be made without

deduction for benefits, when the property is appropriated to a public use, and the other providing for compensation irrespective of benefits, where it is taken by a corporation for a right of way, which two provisions are held in *Giesy v. R. R. Co.*, 4 O. S. 309, in legal effect to be identical.

Whether, therefore, property is appropriated directly by the public or through the intervention of a corporation, the owner is entitled to receive its fair market value at the time it is taken—as much as he might be able to sell it to others for, if it was not taken; and that this amount (says Judge Ranney, 4 O. S. 332) is not to be increased from the necessity of the public, or the corporation or the public to have it, on the one hand; nor diminished by any necessity of the owner to dispose of it, on the other. It is to be valued precisely as it would be appraised on sale on execution, or by an executor or guardian; and without regard to any external causes that may have contributed to make up its present value. The jury are not required to consider how much, nor permitted to make any use of the fact that it may have increased in value by the proposal or construction of the work for which it is taken. To allow this to be done would not only be unjust, but would effect a partial revival of the very abuse which it was a leading purpose of these constitutional provisions to correct. Judge Ranney says that: "It would be unjust, because it establishes for a corporation what is done for no one else—a sort of right in the property of others, to the reflected benefits of its improvements; itself submitting to no reciprocity by affording to others a compensation for the effect of their improvements upon the property of the corporation. And it is doubly unjust where, as must very often happen, the increase in value accrued to the benefit of the former owner, and has been bought and paid for by the present holder, from whom the property is taken at a diminished price."

The language of the constitution is: "Until full compensation—irrespective of any benefit from any improvement proposed by such corporation."

It seems perfectly plain that this intended that the benefits which the remainder of the property might derive from the advantages of the railroad, should not be taken into account as against the value of the land taken. But as said in *R. R. Co. v. Collett*, 6 O. S. 186, there are two kinds of benefits accruing from the construction of a railroad to an owner of land through which it passes. First: General benefits, or such as accrue to the community, or the vicinity at large, such as increased facilities for transportation and travel, and the building up of towns and consequent enhancement of the value of lands and town lots. Second: Special benefits, or such as accrue directly and solely to the owner of the lands from which the right of way is taken; as when the excavation of the railroad track has the effect to drain the morass, and thus to transform what was a worthless swamp into valuable, arable land, or to open up and improve a water-course.

It was the express design of the constitution to exclude general benefits from consideration. But it is perfectly reasonable that after full compensation for the land actually appropriated for the right of way, in view of all its uses and relations, without deducting for benefits of any kind, the jury may in their estimate and assessment consider incidental damages to other lands of the owner from the construction of the road, and make allowance for incidental benefits. This the court in the 6 O. S. 186, refrained from deciding. The rule then seems to be: General benefits accruing from the work can not be considered to deduct the compensation. Special benefits may, after full compensation allowed, be taken into consideration to offset other damages to other lands.

No. 138. Same continued—Opinions of witnesses as to value of property.—Having called your attention to what is meant by "*full compensation*," which the law and constitution guarantees to this defendant, we come now to consider the means for arriving at the rest. It is a general rule in law that witnesses can only state facts within their knowledge. In

this case, however, witnesses have been called to give their opinions concerning the value of the premises in question, and from these opinions the jury form its opinion. You are not bound, however, to take these opinions for any more than you consider them worth. Opinions, like most everything else, vary in value, and like other things are dependant upon something else for their worth. It is the value of the opinions of the witnesses that have testified in this case that you should consider in arriving at the market value of the premises. We say to you that one of the chief elements in the value of an opinion is the knowledge which the witness has of the subject matter of which he testifies. Not the knowledge which he professes, but that which he actually possesses. If the witness has no more knowledge of the subject than men generally possess, or the juror possesses, then his opinion is no better. You are, therefore, in the case now before you, to look well to the foundation of the opinion, each and every witness that has been called. What means has he of knowing about the value of this land? What opportunities have been offered him?

Another element in the value of an opinion is its freedom from interest, bias, or feeling. These are so apt to mould, fashion, and foster an opinion, on that, great caution should be taken in receiving an opinion where these things exist and abound.

We have said thus much that you may the more intelligently understand the application of the law to the evidence in this case and which must be considered by you.

Geo. H. Shepard, P. J., in *P. P. & F. Ry. Co. v. Paine*, approved by Circuit and Supreme Courts. No. 3024 S. C.

No. 139. Same continued — Expert testimony.—The parties in this case have called as witnesses what are known in law as nonprofessional experts. This is a class of persons who, by their especial means of observation or peculiar advantages, have better or more extended means of knowing of the value of the premises in controversy, and it is your province to give each and every witness produced just such weight and credit as you think he is entitled. You should carefully inquire into his means of knowledge, what opportunity he has had for observing and ascertaining the value of this land, what feeling or prejudice he has in the case, what interest in the proceeding.

No. 140. Same continued—How to make up verdict.—Now then, gentlemen, take all the testimony in the case and

bring your judgment and experience as men to bear upon it. There is no rule of law that requires jurors to surrender their judgments implicitly to, or even to give a controlling influence to the opinion of witnesses. You are to take the testimony as given you and with your experience and your judgment as men hew and trim until you have a harmonious verdict. Let the amount of your verdict be of such an amount that this defendant will have secured to him the guarantee of the constitution, to wit: full compensation. Feeling of favor either to the one side or the other should find no place in your deliberations. Let your judgment and your consciences guide you. Take the testimony of the witnesses, weigh it carefully and considerately and as you have sworn to do, justly and impartially assess, according to your best judgment, the amount of compensation due to the defendant for his premises described in the petition.

Geo. H. Shepard, Probate Judge. Approved in The P. P. & F. Ry. Co. v. Paine, by Circuit and Supreme Courts. Lake County S. C., No. 3024.

No. 141. Assessment of compensation for land appropriated.—You are sworn to justly and impartially assess, according to your best judgment, the amount of compensation due to the owner of this land in this case. This is the question, and the only one for you to determine. But in the determination of this question there are two ways you are to consider it. First, you should find what the land actually taken and used by the railroad company is worth; that is, this strip of land fifty feet in width and extending across the whole tract, containing, as the petition avers, three and 30-100 acres of land. What is this land worth? Not as a strip severed and cut out of the whole tract, but what is it worth as a part of the whole tract, taken in connection with it, and without the railroad upon it? Having found what the land taken, that is, the three and 30-100 acres, is worth, then you are to find how much less valuable the remaining part of said land will be rendered by reason of the taking of the strip of land out of it and using the same for building and operating thereon a railroad, as it is now being occupied. That is, you are to say what the damage is, if any, which this land-owner sustains by reason of the construction of this railroad across his land. You were permitted to go and see for yourselves the property of the plaintiff and the location of the railroad across the same. The road having been already constructed, you are the better enabled to see just how it affects the remaining part of plaintiff's land.

You are to find the actual or market value of the land

taken; the actual, as distinguished from any speculative loss the land-owner may sustain. This is the rule that must guide you. But I say to you that you have a right to consider and take into account not only the present use of the land and its value for that purpose, but also any other more beneficial purpose to which, in the course of events at no remote period, it may be applied.

A map or plat has been offered in evidence for the purpose of showing the location of the property and the course of the railroad through the same, and its availability for subdivision into lots. For this purpose only the map is admitted and can be considered as evidence by you, and in this way you may consider it.

If you find from the evidence that this land, or a part of it, is available for such subdivision into lots, you should take this fact into account. But it is the value for so dividing, and not the value of the lots when the division has in fact been made.

The plaintiff is entitled to a compensatory and not a speculative remuneration for the land taken, and for the diminution, if any, in value to the remainder of the land occasioned by the appropriation of the land taken for use of a railroad; and the difference between the actual value of the plaintiff's property without the railroad, and the value of the same property with the railroad as located, is full compensation, and all to which the plaintiff is entitled. In arriving at the amount of compensation to be awarded to the plaintiff, you must not take into consideration facts of a contingent and prospective character, such as the probable amount that may be derived from sales of the property when hereafter divided into building lots and sold as such lots; but you must ascertain the value of the land taken, and diminution in value of the remainder, or injury thereto, occasioned by the taking in view of its present character, situation, and surroundings.

It is the value at the time of the commencement of these proceedings, that is, the present term.

The duty devolved on you in this case is to determine and assess the fair market value of the land which the proof shows you has been taken, as well as the diminution in value at their fair market price of the residue of the lands not taken, and you can not make any use of the fact that the land is increased in value by the construction of the proposed railroad upon it, nor can you make any use of the fact, if it be a fact, that after the taking and the construction of the railroad upon it, manufacturing works are located upon a part of the tract of which at the time of the taking there was no existence, nor probability of such location.

If you find from the evidence that a portion of said tract, described in the petition as one hundred and sixty-three acres, has been laid out into lots, separated from the balance of the tract and sold, such lots or tracts so cut off and sold should not be considered by you as a part of the property of the plaintiff, or as in any way affecting his rights in this case.

From *P. & W. R. R. Co. v. Perkins*, Supreme Court, unreported, No. 1710.

No. 142. Right of public to improve and use a public highway—Construction of railroad in highway a new use.—

“As between the public and the owner of land upon which a common highway is established it is settled that the public has a right to improve and use the public highway in the manner and for the purposes contemplated at the time it was established. The right to improve includes the power to grade, bridge, gravel, or plank the road in such a manner as to make it most convenient and safe for use by the public for the purposes of travel and transportation in the customary manner, which is well understood to be by the locomotion of man and beast, and by vehicles drawn by animals, without fixed tracks or rails to which such vehicles are confined when in motion. These constitute the easement which the public acquires by appropriating land for the right of way for a highway, and these, in legal contemplation, are what the owner is to receive compensation for when his land is appropriated for this purpose. The fee of the land remains in the owner; he is taxed upon it; and when the use or easement in the public ceases it reverts to him free from incumbrance.

“In the exercise of the right of eminent domain, the state, through the general assembly, may delegate to a railroad corporation the power to appropriate a right of way for its road along and upon a public highway. . . . In such case, the rights of the public and the rights of the owner are entirely distinct; and the consent, expressed or implied, of one to the appropriation would not bind or affect the rights of the other. . . . The railroad company, by occupying the highway, constructing its track, and operating its trains thereon by steam motive power, completely diverted the highway from the uses and purposes for which it was established. This new use, to which the highway has been diverted, imposes burdens on the land that are entirely different from, and in addition to, those that were imposed by the highway. The right to so divert the use, and impose additional burdens on the land, could only be acquired by the corporation by agreement with the owner, or by appropriating

and making compensation therefor in the mode prescribed by law.

Daly v. State, 51 O. S. 348.

No. 143. Appropriation for telegraph.—"Upon the question as to the rights of the telegraph company, the court says to you that at the time of the erection of the poles and the construction of the telegraph line, whether in 1882 or in 1884, the land upon which this highway was situated was the property of Mr. T., subject to the right of way for public use for a highway; that is, for travel and keeping it in repair as a highway.

"As between Mr. T. and other individuals or corporations, it could be used for no other purpose without entitling him to compensation for such use, and the entry of this telegraph company upon his land without compensation to him or without an agreement between him and such corporation, if you find this corporation did so enter, was not a rightful entry or occupancy; and as to the trees growing upon this land at the time such company constructed its lines, as between him and such corporation, he had the right to have the trees remain and grow there without injury, whether such injury was necessary or not to the use of the lines of such telegraph company. The United States could not, nor has it attempted to take away by any statute that right. Mr. T.'s right to maintain the trees in the ordinary way was an absolute right, and this right could be taken from him in no way until such time as they acquired the right to maintain such lines by prescription, which means actual occupancy for twenty-one years or more, or by appropriation or agreement; and for this company, by its agents, without first acquiring the right, to enter upon this land and to cut the trees growing thereon would be proceeding without lawful authority.

Approved in *Daly v. State*, 51 O. S. 348.

No. 144. Drainage law—Object of.—As to the first proposition the court will instruct you that the object of the law is to provide means for drainage whenever the public health, convenience or welfare require it. It is not essential that the public at large shall be benefited, but only that part of the public affected by want of proper drainage, or by the improvement to be made. The injury from want of drainage and the benefit to be derived from the ditch are necessarily local in their nature. Public welfare, health and convenience, in this connection are terms used in contradistinction

from mere private benefit. A nuisance is said to be public when it affects the surrounding community generally, and impairs the rights of neighboring residents as members of the public, and private when it especially injures individuals.

The mere fact that the proposed ditch would enable the parties to raise more corn will not authorize a finding in favor of the establishment of the ditch.

From *Marsh v. Phelan*, Clark Co. Approved by C. C. and S. C.

No. 145. What use will justify taking private property for drainage.—The use that will justify the taking of private property by the power of eminent domain is the use for the government, the general public, or some portion of it, and not the use by or for particular individuals, or for the benefit of certain estates. The use may be limited to the inhabitants of a small locality; but the benefit must be in common and not to a very few persons and estates. The property of each individual conduces in a certain sense to the public welfare, but this fact is not sufficient reason alone for taking other property to increase the prosperity of individual men.

The drainage of marshes and ponds may be for the promotion of the public health, and so become a public object; but the drainage of farms to render them more productive, *alone*, is not such an object.

The fact that there are other public ditches near does not affect the right to locate the proposed ditch, if the public health, convenience or welfare demand the proposed ditch. Neither is it the length of a proposed ditch, but the extent of the drainage to be affected by it that determines the power to establish it.

The location of one ditch by the trustees of the county commissioners to drain certain territory will not prevent the establishment of other ditches to drain the same territory, provided that the public health, convenience or welfare demands such ditch.

The jury shall take into consideration any testimony tending to show that the proposed ditch is located upon the line of a ditch located, established and kept open by the township trustees of — Township, — County, O., in determining the question as to whether the ditch petitioned for will be conducive to the public health, welfare and convenience; and also, whether the route thereof is practicable.

Marsh v. Phelan. Approved by C. C. and S. C.

No. 146. Same continued—Benefits to private individuals for cultivation not sufficient.—The mere fact that the

ditch might enable A. P. to raise larger or better crops, or even to cultivate a part of his land which he could not before cultivate, is a fact going to show that he would be privately benefited, but this is not sufficient to authorize you to return a verdict finding that said ditch will be conducive to the public health, welfare or convenience. The evidence derived from your view of the premises and the testimony of witnesses must satisfy you that the establishment of said ditch will be conducive to the public health, convenience and welfare without regard to private benefits before you can return a verdict in favor of the establishment of said ditch. The advantage, convenience or welfare of one or more individuals is not a sufficient reason for the establishment of a public ditch for which private property can be taken and assessments made to pay therefor.

Even if it appears that the proposed ditch will only advantageously drain the lands of A. P., or other individuals, so that their lands will be better adapted to agriculture, or rendered more valuable in any way, this will not be sufficient to authorize you to find in favor of said ditch. To do so, it must affirmatively appear to you from your view of the route and the testimony of witnesses, that the community generally about said proposed ditch will be benefited in health, convenience or welfare by the establishment of the same. If said ditch does not affect the community generally, but only benefits the property of certain individuals, it will be your duty to find that said ditch will not be conducive to the public health, convenience or welfare.

Marsh v. Phelan. Approved by C. C. and S. C.

No. 147. Drainage proceedings continued—Burden of proof as to questions of use.—The burden of proof on the questions as to whether the proposed ditch will be conducive to the public health, convenience or welfare, is upon the party seeking the establishment thereof, and if you are not satisfied by a preponderance of the evidence, from your view of the premises and the testimony of witnesses that the proposed ditch will conduce to the health, convenience or welfare of the public generally in the vicinity of the same, it will be your duty to find that said ditch will not be conducive to the public health, convenience or welfare.

Marsh v. Phelan. Approved by C. C. and S. C.

No. 148. Same continued—Number of petitioners.—One petitioner is sufficient, and in order for the ditch to be for

the public health, convenience or welfare, the whole land from which the benefit is to be derived may be owned by one person only. So, if you find, under the rules stated, that the proposed ditch would better drain the land of A. P., and thereby be conducive to the public health, convenience or welfare, it will be your duty to find in favor of the ditch.

Marsh v. Phelan. Approved by C. C. and S. C.

No. 149. Same continued.—Determination of line of construction of ditch—Considerations to be observed.—You are to determine whether the route of the proposed ditch is a practical one—that is, you are to say whether or not if the ditch be constructed upon the line and route as determined upon by the commissioners it will reasonably meet the ends and objects for which the construction has been sought.

In determining this matter, you should consider the route as located, in relation to the surrounding lands, the outlet provided, and generally whether it will serve the purpose for which it was intended, and that it will drain, or aid in draining, the land near or through which it extends.

In the location of such a ditch it was not necessary that the natural flow of the water be followed, but only that the route determined upon be a practicable one.

The burden of proof upon the question as to whether the route of said ditch is practical is upon the party seeking the establishment thereof, and if you are not satisfied by a preponderance of the evidence from your view of the premises and testimony of witnesses, that the route of the ditch is practicable for the purposes sought to be attained thereby, it will be your duty to find that the route of said proposed ditch is not practical.

Marsh v. Phelan. Approved by C. C. and S. C.

No. 150. Same continued — Compensation for lands taken.—You are to determine how much compensation is due to S. M. for the lands appropriated for the construction of this ditch upon the proposed route. The value of the lands actually used for the ditch must be allowed her. In considering this question, the fact that she might receive benefits from the proposed ditch can not be taken into consideration in allowing or fixing her compensation.

You must allow her just such sum as will compensate her for the loss of land used in the construction of the ditch.

The fair market value in cash at the time it is taken must be allowed her.

There is a difference between the terms “compensation”

and "damages." Compensation means an appropriation for land actually used in making and constructing the ditch. Damages is an allowance made for any injury that may result to the lands affected by reason of the ditch to be constructed.

You are to determine what damages, if any, are due to S. M. for property affected by this proposed ditch.

In determining the damages you will consider how much less valuable, if any, the remaining lands will be by reason of the construction of the ditch.

Where land is appropriated for a public use, a compensation, not a speculative remuneration, is guaranteed by the law for the land taken and for damages occasioned thereby to the remainder of the premises. The differences in value of the owner's property with the appropriation and that without it is the rule of compensation. This difference must be ascertained with reference to the value of the property in view of the present character, situation, and surroundings.

Under the head of damages may be considered the fact whether the proposed ditch will cause any overflow of Mrs. M.'s premises, or backwater upon it, or will destroy the symmetry of her land, or access to, or egress from it, or any actual damage that will result to her premises by reason of the construction of the proposed ditch. But these damages must be actual and not speculative. If you find that her premises will not be injured in any respect whatever by said ditch, if located, that the land will be benefited as much or more than it will be injured by the proposed ditch, you may allow her no damages.

Marsh v. Phelan. Approved by C. C. and S. C.

No. 151. Same continued—Purpose of a view of route of ditch by jury.—You were ordered to view the whole route, as located by the county commissioners, of the proposed improvement and the lands surrounding. This was for the purpose of enabling you to determine the questions in this case, and to apply your own judgments in regard to them as well as to the better understanding of the evidence given, and in making up your verdict you will consider both the facts appearing to you from the view of the premises and the evidence adduced.

You are to determine the questions presented to you in this case not alone on the evidence of witnesses, but also from your view of the route of the proposed ditch.

From Marsh, et al., v. Phelan, et al., Clark County. Probate Court was affirmed by the Circuit Court, and the latter court was affirmed by the Supreme Court.

ESTOPPEL.

No. 152. Defined.—"Where one person, by his acts or declarations made deliberately and with knowledge, induces another to believe certain facts to exist, and that other person rightfully acts on the belief so induced, and is misled thereby, the former is estopped to afterwards set up a claim based upon facts inconsistent with the facts so relied upon, to the injury of the person so misled. This definition embraces all the essential elements of an estoppel. It will be your duty to examine the evidence, and ascertain whether all these elements are proved in this case."

From *Pennsylvania Co. v. Platt*, 47 O. S. 366.

No. 153. Must cause an injury.—The jury are instructed that a person is not estopped from denying the truth of his own statements, unless it appears that they were made in bad faith, or fraudulently, or their equivalent, gross negligence, or that the party setting up or claiming such estoppel has been prejudiced thereby.

McKinzie v. Steele, 18 O. S. 38. An act must be both injurious and willful. *Nye v. Denny*, 18 O. S. 246; *Penn. Co. v. Platt*, 47 O. S. 366.

No. 154. Intention—Whether necessary.—The jury is instructed that it is not necessary to constitute an estoppel that a party should intend or design to mislead; it is enough if the act or declaration was calculated to and did in fact mislead another who acted in good faith and with reasonable diligence.

Rosenthal v. Mayhugh, 33 O. S. 155; *Beardsley v. Foot*, 14 O. S. 414; 14 O. S. 102; *Blair v. Wart*, 69 N. Y. 113.

No. 155. Statements must be acted upon.—The jury are instructed that before a party can be estopped from denying the truth of any statement it must appear from the evidence that such statements have been acted upon by another, and that they were acted upon in ignorance, differently from what he otherwise would have done, and that such person will be injured by allowing the truth of the admission by the declaration or conduct so acted upon by him to be disproved.

Penn. Co. v. Platt, 47 O. S. 366, 1 *Greenleaf's Ev.*, Sec. 209.

EVIDENCE—WITNESSES.

No. 156. Allegations in pleadings, requiring and not requiring proof.—You are instructed that the allegations of the pleadings as admitted by the answer did not require any proof, but the allegations that are denied by the answer, and the allegations of the answer that are denied by the reply, and allegations of any new matter in the reply do require proof by the respective parties.

Melhorn, J., in *Carnahan v. Fire Insurance Co., Hancock Co., Com. Pleas.*

No. 157. General instruction as to how evidence is to be considered.—In determining the issues of fact in this case, you will take into consideration all the evidence bearing upon the respective questions.

The evidence is not what counsel on either side said to you in the opening statement they expected the testimony to show; not what they have said to you in the course of the argument, nor to the court in your presence; nor is it what I may state to you as my recollection of the testimony in the charge.

The opening statement is made to enable you to understand the testimony as it is offered. The argument is to assist you in reaching a proper conclusion, the charge is to give you the law, which shall guide you in your deliberations. The evidence is what the witnesses have been permitted to say to you while upon the witness-stand.

You are made the sole judges of all questions of fact. You must determine the facts from the evidence in the light of the law as I have stated it to you.

You are the sole judges of the credit to be given to the witnesses, and of the weight of the evidence. Bear in mind that the court is to determine the competency, the jury the weight. Courts admit evidence not by reason of its weight, but because of its tendency to prove or disprove the issue; leaving its truth or falsity and its weight to the jury.

You may believe or disbelieve all that a witness has testified to, or you may believe or disbelieve a part.

In determining the credit to which a witness is entitled, and the weight which shall be given to his evidence, you may properly take into account his interest in the result of

the trial, his relation to the parties to the suit, the influence he may be under, his kinship to the parties, if any, and his demeanor upon the witness-stand.

A witness who goes upon the witness-stand and frankly gives testimony without regard to whether it be for or against the party calling him as a witness, giving testimony in accordance with admitted facts in the case, or that is corroborated by other witnesses, presents strong claims to credence at your hands.

Upon the other hand, a witness who goes upon the stand and freely gives testimony for the side calling him, but who testifies unwillingly upon the other side, or who becomes pert and impudent on cross examination, presents no such claims. The testimony of such a witness should be carefully scrutinized by the jury.

In weighing the evidence you should take into account the means or opportunities of the witness to have knowledge about the matters testified to. You should also take into account the probability or improbability, the possibility or impossibility of the story told by the witness.

In determining the facts, gentlemen of the jury, you should proceed upon the theory that all the witnesses have tried to testify truthfully. If there be conflict in the evidence, as there is in nearly every case, you should, if possible, reconcile it with the truth and find the facts.

No. 158. Preponderance and weight of the evidence—Meaning of.—By preponderance of the evidence is meant evidence that you, in your jury room, considering the evidence and weighing it, conclude is the evidence that you believe and that influences your minds in arriving at the conclusion you reach.

The weight of the evidence does not necessarily mean that one side has more witnesses than another; it simply means that if, when weighing all the testimony of all the witnesses with reference to their credibility, correctness of memory, and to the circumstances surrounding their testimony, appearing in the case, the evidence of one side outweighs that of another, then such side is said to have the weight of the testimony. The jury are the sole judges of the weight of the testimony and the credibility of the witnesses. If one witness testifies directly opposite to another, the jury is not bound by that fact to regard the weight of the evidence as evenly balanced. The jury has the right to determine from the appearance of a witness on the stand, his manner of testifying, his apparent candor, his apparent intelligence or

lack of intelligence, his relationship, business or otherwise, to the party, his interest, if any may appear from the evidence, his temper, feeling or bias, if any; and from this and all other circumstances appearing in connection with the testimony on the trial the jury has the right to determine which witness is the more worthy of credit, and to give credit accordingly. But, of course, if the witnesses are otherwise equally creditable, greater weight should be given to the testimony of those who swear affirmatively to the fact, rather than those who swear negatively as to the want of knowledge or recollection. So if the witness is an employee of either party and the jury should believe that the witness has testified under fear of losing his employment, or a desire to avoid censure or fear of offending, or a desire to please his employers, such fact may be taken into account in determining the degree of weight which ought to be given to the testimony of such witness. But men are not under suspicion or disability as witnesses simply because they are employees, and it will not do to assume that the man has disregarded his oath and is unworthy of belief simply because he is an employee. It is for you to determine whether his relation has or has not in any way embarrassed or restrained him from telling the truth.

Melhorn, J., in *Carnahan v. Pa. Fire Insurance Co., Hancock Co. Com. Pleas*.

Another Form.—In speaking of proof—preponderance of proof—it is perhaps hardly necessary to say to the jury that testimony is not to be measured by the number of witnesses. It is not that at all. You are to judge of the character of each witness. You are to determine what weight should be attached to any one witness's testimony. You have seen the witnesses upon stand that have testified here. You have heard the depositions of others read. You are to judge of the weight to attach to every witness's testimony. You have seen their appearance, the evidence of candor or lack of candor shown; the interest manifested by them or their disinterestedness, as the case may be; and you are out of all to determine how much weight shall be attached, and determine upon the whole volume of the testimony, and the whole facts submitted to you, where the truth of the matter lies; and determine out of it all whether the plaintiff has established by the proof the claims here made.

As to preponderance see Whittaker's Code of Ev., Sec. 148.

No Degree of Preponderance.

There are no degrees of preponderance; hence language should not be used which would lead the jury to conclude that there were degrees, or that the evidence must be of a clear and convincing character. Therefore, to instruct the jury that there must be a *clear* or a *fair* preponderance, would be error. *Russell v. Russell*, 6 O. C. C. 294; *Effinger v. State*, 9 O. C. C. 376.

It means greater weight, not larger number of witnesses. *Holmes v. Holland*, 29 W. L. B. 115.

It is not necessary to repeat the statement that a preponderance of evidence is required to justify a verdict, with every reference to the evidence made. *Reipe v. Elting*, 26 L. R. A. 769; 89 Ia. 82.

No. 159. Declarations and statements—How considered—Civil cases.—Declarations and statements of persons should always be received by the triers of a cause with care and caution, for the reason that the parties may not have been understood at the time the statements were made; that the parties who now repeat them did not fully understand them, and the possibility that they were not recollected and repeated correctly in court.

But the court says to you that, when you are satisfied that the declarations and statements have been made and correctly given in evidence, they afford very strong and convincing evidence and proof, for the reason that parties are not supposed to make declarations against themselves and interest.

Gillmer, J., in *Hickox v. Ins. Co., Trumbull Co. Com. Pleas.* Affirmed by Circuit Court.

No. 160. Declarations or admissions of the party to the suit—Another form.—You are instructed that parol proof of the verbal admissions of a party to a suit, when it appears that the admissions were understandingly and deliberately made, often affords satisfactory evidence; yet, as a general rule, statements of the witness as to the verbal admissions of a party should be received by the jury with great caution, as that kind of evidence is subject to much imperfection and mistake. The party himself may not have clearly expressed his meaning, or the witnesses may have misunderstood him, and it frequently happens that the witnesses by unintentionally altering a few of the expressions really used, give effect to the statement completely at variance with what the party did actually say. But it is the province of the jury to weigh such evidence and to give it such consideration to which it is entitled in view of all the other evidence in the case.

Gillmer, J., in *Jones v. N. Y. L. E. & W. Co., Trumbull Co. Common Pleas.*

Declaration against interest competent evidence. *Whittaker's Code Ev., Sec. 17; 1 Greenleaf Ev., Sec. 171.*

No. 161. Admissions or declarations, how considered in criminal cases.—You are instructed that confessions or admissions of the defendant should be acted upon by you with great care and caution; and before there should be any conviction upon the ground of admissions, such admissions or confessions should be corroborated by other testimony as to the body of the crime. They may, however, be considered as evidence and used in connection for that purpose with other evidence in the case. In this class of testimony there

is always danger that the persons who make the declarations or admissions may not have been fully understood. There is also a liability of the person who repeats it to not remember it all, or correctly repeat it afterwards. But if you are satisfied that admissions or declarations were made, correctly understood and repeated in court, then you are instructed that that class of evidence is considered very satisfactory for the reason that the party making the declarations is not presumed to make them against his own interest. . . . You should consider all the circumstances under which they were made, if they were made, to whom they were made, as well as the recollection or want of recollection of the witnesses in regard to any part of these alleged confessions. You should consider the whole of what the defendant said at that hearing; that is to say, that the whole admission, if any, must be taken together. As well that part which is favorable to the accused as that which is against him.

Gillmer, J., in *State v. Robins*, Trumbull Co. Com. Pleas.

No. 162. Declarations against interest in criminal cases—Another form.—On the part of the state it is claimed that there is evidence in the case tending to show that the defendant at various times, and to various persons who were before you as witnesses, made statements or admissions against his interest, and which tended to show his guilt. The statements and declarations made by the defendant and offered in evidence against him, should be carefully examined and considered by you. These statements have been offered by the state, but the exculpatory parts thereof, or parts thereof in his justification, as well as those which import guilt, are to be received and considered by you. You should consider the entire statements or declarations, and in the light of all the testimony in the case give to such statements and declarations the weight which in your judgments the same are justly entitled to receive.

A considerable portion of the evidence consists of testimony tending to show conversations in which the prisoner and others are said to have participated. No class of testimony is more unreliable and a more frequent cause of error in the courts of justice than the narration of conversations real or pretended.

The meaning or intention of the person in the conversation often depends upon gestures, mode of expression, or peculiar circumstances, known perhaps but to a few present. A conversation may not be fully heard; it may be imperfectly

recollected, or inaccurately repeated, when the omission or addition of a word, or the substitution of the language of the witnesses, under color of bias or excitement, or the words actually used might change the sense of the conversation. This is apparent from the contradiction daily manifested in the courts of justice in the narration of the same conversation from the mouths of different persons. In considering this class of testimony, you should view it with deliberate care and scrutiny. In this connection, however, I will say to you that where a statement or admission is deliberately and voluntarily made by the admission or statement there made, is carefully remembered and accurately detailed, such declarations or statements made against interest may be of the most satisfactory nature.

Wm. R. Day, J., in *State v. Webster*, Trumbull Co. Com. Pl. Conduct and sayings of party accused admitted not as confession, but as source of information respecting the guilt or innocence of defendant. Whittaker's Ev. p. 125.

No. 163. Inferences to be drawn from conduct of parties and omission to produce evidence.—In determining the questions involved in this case, you are at liberty to look to the conduct of the parties, and if you find from a consideration of all the evidence that a party has omitted to produce evidence in elucidation of the subject matter in dispute which is within his power, and which rests peculiarly within his knowledge, you may draw such conclusions from it as in your judgment such omission warrants; while it is not a presumption of law that such omission to produce evidence renders it probable that the party withholding it does so because he knows that if it were produced it would operate to his prejudice, yet the law permits you to draw such conclusions or inferences, and to give to it such weight as your judgment may warrant.

Newby, J., in *Graham v. Graham*, Highland County, Common Pleas. "The ordinary presumption where a party fails to offer proof of what he ought to prove, if it exist, is that the question was not asked because the answer would have been unfavorable." Whittaker's Code of Ev. p. 502.

No. 164. Credibility of witnesses.—In determining the credibility of the witnesses you may consider their intelligence, their ability to relate what they saw or heard, and the circumstances by which each of them was surrounded. You may also consider their manner on the witness-stand while testifying. Did they show a zeal in testifying against or for either side? Did they exhibit a reluctance to testify for or against either side? You may also consider whether each

witness was corroborated or contradicted by other witnesses in the case of close credibility. You must pass upon the amount of credit you will attach to every fact. That requires you to look at the testimony of each witness in its own and in the light of the other facts. You may consider the relation that each witness bears to the case and the interest which he has in the result. If any one of them is to be affected seriously by the result of the case, by your verdict, then in fixing on the weight of his testimony you should consider that fact. Some of the witnesses may have an interest in the conviction of the defendant. The defendant may have an interest in his liberty. Next to his interest in this life is his interest in his liberty. That is human and applicable to all of us. Your verdict may affect this interest of the state's witnesses in conviction, and it may affect the defendant's interest in his liberty. Witnesses have been known to testify falsely by such interests as I have just explained, and it is for you to say whether any of the witnesses for the state or the defendant have been moved to testify falsely by reason of such interest. In determining the weight to be attached to each and every witness' evidence, you may also consider the probability or improbability of the truth of the statements which they made. You are not obliged to believe the statements of any witness merely because he made them; and you may, if your judgment dictates, believe part and disbelieve part of any witness' testimony.

Pugh, J., in *State v. Abbott*, Franklin Co. Com. Pleas.

Credibility is a matter of induction, to be determined by the jury, under such instructions, as to the reason of the case, as may be given by the court. Wharton's Cr. Ev., Sec. 384.

Interest.—No person is disqualified as a witness by reason of interest. Whittaker's Ev., Sec. 205. Relationship, party sympathy, personal affection influence the perceptive powers as effectively as pecuniary interest. Wharton's Cr. Ev., Sec. 376. Interest and sympathy may always be shown. *Id.* Secs. 376-377, 488.

Credibility depends on capacity to observe and capacity to narrate. Wharton's Cr. Ev., Sec. 377.

No. 165. Impeachment of witness.—If the jury find from the evidence written or oral, or both, that any witness in the case is discredited or impeached as to the testimony on any one material fact, then, and in that case, the jury may in their discretion regard the testimony of such witness which is not corroborated or supported, as discredited or impeached as to other statements he makes in his evidence.

From *Dye v. Scott*, 35 O. S. 194. Limitation of number of witnesses as to character. R. S., Sec. 7287; 49 O. S. 270. Court may exercise its discretion in limiting the number. *Bunnell v. Butler*, 23 Conn. 65.

The jury in some jurisdictions may be charged that "the testimony of

an impeached witness is to be taken with great care by the jury, and, unless fully corroborated, the jury will be justified in giving it no weight whatever, and it is only on such points as the witness may be corroborated that the witness is entitled to credence and weight with the jury." *Green v. Cochran*, 43 Ia. 545.

Whether or not a witness has been successfully impeached, or how far the value of his testimony has been impaired by impeaching evidence is exclusively within the province of the jury. You may, notwithstanding you believe from the evidence that the reputation of the witness is not good, nevertheless give such weight to his testimony in this case as you may believe it entitled to, or you may disregard it entirely if you believe it entitled to no weight.

Addison v. State, 48 Ala. 478, 482; *State v. Miller*, 53 Ia. 209.

No. 166. Impeachment of witness—Another form.—

You are instructed that if the general character of the plaintiff (or other witness) for truth is successfully impeached (it is for you to say from the evidence whether or not he has been so impeached), you are not necessarily bound to discredit his testimony; you are the judges of the credibility of the witness, and all the weight to be attached to the testimony of each of them, that of the plaintiff as well. You are not bound to take testimony of any witness as absolutely true, and you should not do so if you are satisfied from all the facts and circumstances, provided on the trial that such witness is mistaken in the matter testified to by him, or that from any other reason his testimony is untrue or unreliable. The effect of impeaching the plaintiff goes only to the weight that should be given to his evidence. It is submitted to you better to enable you to determine in what light to estimate his testimony; but it should have no effect as to facts that you find to be established from their evidence offered in the case. It does not impeach his right to be protected as fully as the right of any other person. The law as to its remedial arrangements is wholly impartial. Society requires the protection of the rights of the bad man as much as it does the rights of the good man. In that respect law is no respecter of persons.

Voris, J., in *Otto v. Mills*, *Summit Co. Com. Pleas*.

No. 167. Circumstantial evidence—Defined by Judge Day.—In criminal cases the evidence may be either direct or circumstantial, or both; if a witness sees, knows, and testifies to the commission of the ultimate fact to be proven, that is positive or direct evidence. But it is not always possible in

criminal cases to establish guilt by direct and positive testimony, nor is it necessary, and the law provides that circumstantial evidence alone, where sufficient to satisfy the mind beyond a reasonable doubt, shall justify conviction.

Circumstantial evidence is proof of facts standing or existing in such relation to the ultimate fact or facts to be proven that such ultimate fact may be inferred or deduced from such surrounding fact or facts. However, it must be remembered that before there can be any legal conviction of the defendant in this case, the evidence whether it be direct or circumstantial, or circumstantial alone, must be so clear and convincing as to exclude from your minds, and from the mind of each one of you, all reasonable doubt of the guilt of the defendant. Each and every circumstance and fact from which an inference is sought to be drawn against the defendant must be proven beyond the existence of a reasonable doubt before such inference can be drawn therefrom, and the hypothesis of guilt should flow naturally from the facts found and be consistent with them all.

Before any such inference can be drawn therefrom, and such fact relied upon as the basis of any legal inference against the defendant, it must be strictly and indubitably connected with the main charge, to wit: The killing of the deceased by the defendant. If the evidence in the case can be reconciled with the innocence of the accused, you should so reconcile it. It is not sufficient to entitle the jury to render a verdict of guilty that the facts and circumstances established by the proof coincide with, account, and therefore render probable, the hypothesis of guilt; but such proof must exclude to a moral certainty every reasonable hypothesis than that of guilt.

Wm. R. Day, J., in *State v. Webster*. See Wharton's Cr. Ev., Sec. 10; Wills on Cr. Ev. 185.

No. 168. Circumstantial evidence—Another form.—

What is meant by circumstantial evidence in criminal cases is proof of such facts and circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged; and if these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty. To authorize a conviction on circumstantial evidence alone the circumstances should not only be consistent with the prisoner's guilt, but they must be inconsistent with any other rational conclusion or reasonable hypothesis, and

such as leave no reasonable doubt in the minds of the jury of the defendant's guilt. Circumstantial evidence is legal and competent in criminal cases, and if it is of such character as to exclude every reasonable doubt, it is entitled to the same weight as direct testimony.

Nye, J., in *State v. Brant*, Medina Co. Com. Pleas.

No. 169. Circumstantial evidence—Continued.—Circumstantial evidence is often the most convincing.¹ It is difficult to fabricate the connected links in a chain of circumstances so as to preserve the semblance of truth. When the circumstances detailed are real and natural they will correspond with each other. When they are inconsistent with each other or irreconcilable with the admitted or proven facts, then results a plain and almost certain inference that artifice has been resorted to and that the tale is not true.²

¹ "Circumstantial evidence is often stronger and more satisfactory than direct, because it is not liable to delusion or fraud." *State v. Thorne*, 6 Law Rep. 54.

² Gillmer, J., in *Hickox v. Ins. Co.*, Trumbull Co. Com. Pleas.

No. 170. Negative and affirmative evidence—How considered.—Evidence has been offered tending to show that the bell was ringing, and evidence has been offered tending to show that the bell was not ringing at that time, and in considering the testimony upon this subject, you will consider it a rule of presumption in the law of evidence that, where witnesses are of equal credibility, the one who testifies to the affirmative is ordinarily to be preferred to the one who testifies to the negative, for the reason that the one who testifies to the negative may have forgotten. It is impossible to forget a thing that did happen. It is not possible to remember a thing that never happened.

Johnston, J., in *Youngstown St. R. R. Co. v. N. Y. L. E. & W. R. R. Co.*

An instruction that the positive testimony of a witness to the existence of a certain thing, and the testimony of another witness that such a thing does not exist, are equally credible, is erroneous, as it ignores every well-settled principle which is applied in determining the credibility of witnesses, and lays down the rule that one witness will counterbalance another. *Smith v. M. B. & T. Ex.*, 30 L. R. A. 504.

An instruction that "positive testimony of a small number of witnesses that they saw or heard a given thing occur will outweigh the negative testimony of a greater number of witnesses that they did not see or hear it, provided the witnesses are equally credible; but in connection with this instruction should be considered the relative means or opportunity of the several witnesses to see or hear the occurrence, and it should be carefully kept in mind that it only applies when the witnesses are credible," is proper. *Draper v. Baker*, 61 Wis. 450.

Affirmative testimony is entitled to more weight than that which states that the witness did not see or did not hear. *Toledo Con. St. Ry. v. Rohner*, 9 O. C. C. 702. See 2 O. 415, 426; T. (11), 43.

No. 171. Weight to be given expert testimony as to personal injury—Medical.—As bearing upon the question of the plaintiff's injuries, both plaintiff and defendant have called medical experts to whom hypothetical questions have been put for the purpose of enlightening you upon the issue between the parties in that respect; that is, persons of experience in the medical profession have been called, to whom questions embodying certain statements as facts in the case have been put, and upon which statement of facts the witness has given his opinion. This is testimony which should be considered by you in determining this question between the parties, and the weight to be given to it depends upon the skill and experience of the physician, his learning, capacity, and upon whether or not the question and statement of fact contained in it, upon which the opinion is expressed, is a true statement of the facts as to the plaintiff's condition, as you find them to exist from the testimony in the case. If the question with this statement of fact put to the witness, upon which he expresses his opinion, does not embody the facts as you find them to have been established by the testimony, then the opinion is of little if any value in determining the issues in the case. If, however, the questions embody substantially the facts as you find them to exist and from the testimony, then you should give to them such weight as in your judgment, in the light of all the testimony in the case they would be entitled to, in determining this question.

Lampson, Judge.

No. 172. Weight to be given opinions of experts.—Witnesses, you know as a rule, are required to or only allowed to testify as to facts within their own knowledge, but in this case witnesses have been allowed to give their opinion; they are what are called experts and the rule as to them is this: They are first examined in your hearing to see if they are qualified, that is, if the court will permit them to give an opinion, then they may give it, but you are then the judges as to what weight that opinion is entitled.

No. 173. Medical testimony as to nature of human blood.—Experts, both medical and those who have made the nature and properties of human blood a special study, were examined in regard to some matters in dispute between the state and the defendant. These experts were allowed to testify and give their opinions on account of the special skill and knowledge they had acquired from the study and practice in reference to the matters to which their testimony referred.

And notwithstanding their special skill and knowledge, you are to decide upon the value of the testimony and award to them, all and each of these experts, such weight as you may think their testimony deserves; the credibility of witnesses who have testified in this case, as well as the weight and effect of the circumstances are solely for your consideration and determination.

In weighing the testimony of witnesses, you should take into consideration the reasonableness and probability of the story they tell when on the witness-stand, their strength of memory, whether they are contradicted or sustained by any reliable testimony in the case, any interest which any witness may have, or feelings in the case, or any proper consideration developed by the proof, which may aid you in arriving at a just conclusion.

William R. Day, J., in *State v. Webster*. See, as to identification of blood, Wharton's Cr. Ev., Sec. 777a (8th Ed.).

No. 174. Effect of uncorroborated testimony of accomplice.—While there is no rule of law in this state preventing the jury from convicting upon uncorroborated testimony of an accomplice, still a jury should always act upon such testimony with the greatest care and caution, subject it to the most careful examination in the light of all the other evidence in the case, and the jury ought not to convict on such testimony alone, unless a full and careful examination thereof has satisfied them beyond the existence of a reasonable doubt of its truth and that they can safely report upon it.

Gillmer, J., in *State v. Champlin*. The conspiracy must be proved beyond a reasonable doubt. *Ditzler v. State*, 4 O. C. C. 551.

Corroboration.—The uncorroborated testimony of an accomplice may be sufficient to convict (10 O. S. 287), but is generally not entitled to much weight (19 O. 131, 135), and the court should caution the jury as to its unreliability. *Allen v. State*, 10 O. S. 287.

The jury may convict upon the uncorroborated testimony of an accomplice if it satisfies them beyond a reasonable doubt of the guilt. *Com. v. Scott*, 123 Mass. 222; *Com. v. Elliott*, 110 Mass. 104; *Com. v. Snow*, 11 Mass. 411.

No. 175. Previous good character—How to be considered in criminal case.—The defendant relies upon his previous good character and some evidence has been introduced upon that point. That evidence you are to consider in the case precisely the same as the rest of the testimony. A defendant in a criminal case has the right to put in evidence concerning his former good character, his previous life. It is evidence tending to raise a probability that one who had such a character would not commit a crime. It is not, however, con-

clusive. It is simply evidence to be considered with all the other testimony for the purpose of determining whether the proof, taken as a whole, establishes his guilt beyond a reasonable doubt. If it does not, even this evidence may of itself create a reasonable doubt, and if it does, he is entitled to the benefit of that doubt. But if, when you come to take the evidence of character together with all the other testimony submitted for your consideration, and you are satisfied when you look at it and consider and weigh the effect upon your minds and judgment, if ultimately your minds are convinced beyond a reasonable doubt that the defendant is guilty, notwithstanding his standing and position in the community, notwithstanding his previous good character, he is guilty of the judgment of the law, it is your duty to so pronounce by your verdict.

It is a matter of common observation and experience that, owing to a latent weakness in the human character, men of the best standing, men whose lives have been characterized by long integrity and fidelity in all life's relations are found, on occasion when temptations are presented to them, to yield, to give way, and to fall into the commission of crime. It is temptation which subverts human character, destroys human integrity and uproots human fidelity, and under the influence of it—under the impulse of the occasion—men of that kind give way when it would be expected they would resist. There is no intimation in making this statement that the defendant has done this, but your attention is simply called to that weakness of the human character, which needs no proof, because it is common observation and experience, and you are instructed that it is proper for you to consider it in giving the proper weight and effect to the evidence touching the previous character of the defendant.

Pugh, J., in *State v. Abbott*, Franklin County Common Pleas. Character may be shown. 11 O. S. 114. Its bearing is for jury. 22 O. S. 477. It is error, however, to charge that it is entitled to less weight where the question is one of great criminality. 19 O. S. 264. See full discussion Wharton's Cr. Ev., Sec. 57, *et seq.*

Evidence as to reputation. A short charge. Testimony has been offered and permitted to be given to you as to the general reputation of the defendant for honesty. "The reasonable effect of proof of good reputation is to raise the presumption that the accused was not likely to have committed the crime with which he is charged. The force of this presumption depends upon the strength of the opposing evidence to produce conviction of the truth of the charge." Good reputation is certainly no excuse for crime, and it is a circumstance bearing indirectly upon the guilt of the accused which the jury are to consider in ascertaining the truth of the charge. The evidence offered by the defendant of his good reputation for honesty is to go to the jury and be considered by them in connection with all the other facts and circumstances, and if they believe the defendant to be guilty they must so find notwithstanding his good reputation.

Nye, J., in *State v. Wideman*, Medina Co. Com. Pleas.

No. 176. Evidence of good reputation—Refuting charge of destruction of property.—Evidence of the good reputation of the plaintiff as to being a law-abiding citizen, has also been offered in evidence. This was competent as tending to show that it was not probable that he would have been the means of destroying the property. But if the proofs would show that the plaintiff burned his property in question, then evidence as to his good reputation could not prevail against that fact

Gillmer, J., in *Hickox v. Ins. Co., Trumbull Co. Com. Pl.* Affirmed by Circuit Court.

No. 177. Conduct importing guilt.—It is claimed on the part of the state that there is evidence before you tending to show conduct on the part of the defendant importing guilt.

The conduct and statements of the defendant at and after the time of his arrest should be fairly considered by you, and such allowance by you as is reasonably just, considering the surrounding circumstances under which the defendant was placed, and the liability of the witnesses to pervert or understand such conduct and statements.

Wm. R. Day, J., in *State v. Webster, Trumbull Co. Com. Pl.* Confessions may be by *acts* as well as by *words*. Acts of a prisoner in hiding stolen property, and in flight, and the conduct of an accused when informed of the accusation. *People v. McKee*, 36 N. Y. 113; *Jewett v. Banning*, 21 N. Y. 27; *Com. v. McPike*, 3 Cush. 181. Confusion, embarrassment, "blushing," and "terror," may be shown against accused. *Wharton's Cr. Ev.*, Sec. 751 and cases cited. In a note this quotation appears from a charge by Judge Learned: "I do not think much reliance is to be placed upon the manner of any man when he is suspected or accused of crime. I mean whether he looks pale or flushed, or the like, for it is impossible for us to tell how a man may act when he is accused of crime. Our own judgment in that is not very reliable; one of you may appear to me flushed or frightened, and to another not so. Therefore I do not think much reliance is to be placed upon the opinion of witnesses as to manner. I don't speak of conduct, but as to manner." *Id.* See *Russell v. State*, 53 Mass. 367.

No. 178. Testimony as to recognition of accused.—In considering the testimony of witnesses as to the recognition of the defendant on the night of the alleged homicide, you are permitted to take into consideration and consult your own knowledge and experience, as to the certainty or want of certainty with which the question of identity may be determined, and in determining the value of the testimony of the witnesses as to a recognition of the defendant, you should examine into the facts upon which such witnesses base their testimony. You should inquire what were the opportunities which such witnesses had of knowing and recognizing the defendant; what means the witness had of seeing and know-

ing the countenance and person of the defendant; the previous acquaintance which such witnesses had with the defendant; whether such acquaintance was casual or otherwise, and whether the witness was, at the time of the alleged recognition dispassionate, collected, observant, or otherwise. Familiarity with the person sought to be identified, though not essential to competency, may be of much importance in determining the weight to be given to the testimony of the witnesses testifying to the identity of another.

Wm. R. Day, J., in *State v. Webster*.

No. 179. Proof of alibi.—There is evidence tending to show and the claim of the defendant is that at the time when the alleged homicide was committed, he was in the village of G., five miles or more from the house of said H.

You will look carefully into the evidence bearing upon this question, and from it all determine what the truth is in respect thereto. If the evidence satisfies you that the defendant was in the village of G. at the time it is claimed by the state that the homicide was committed, or if the evidence upon that question, either taken by itself or taken in connection with other evidence in the case, raises a reasonable doubt in your minds of the defendant's guilt, you should acquit the defendant. The failure of the evidence to satisfy you that he was in the village of G. at the time in question would not afford any presumption that he was present at the time and place when and where the crime is alleged to have been committed.¹

The defendant is not compelled to account for his whereabouts on the night the alleged homicide was committed, and his failure to give a satisfactory account of his whereabouts at that time would not authorize an inference or presumption to be drawn that he committed the crime.² But if at any time he freely and voluntarily undertook to give an account of his whereabouts on the evening of the homicide, and at the time the state claims the crime was committed, and in giving such account he made a false, untrue, or contradictory statement concerning the same, and you are satisfied beyond a reasonable doubt that he made such statements, it would be your duty to consider as evidence that he made such false, untrue, or contradictory statements, and give to each such weight as you think it justly entitled to under all the circumstances, including his age, circumstances, condition of mind at the time.³

¹ *Toler v. State*, 16 O. S. 583.

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³ *William R. Day, J., in State v. Webster.*

See Wharton's Cr. Ev., Sec. 333. Burden of proof is not changed by this defense. Whittaker's Code Ev., p. 406. Judge Thompson (on Trials), Sec. 2436 says: "It is unavoidably logical, and hence proper, to instruct the jury that the defendant can not be convicted if the evidence adduced by him tending to show an *alibi* raises a reasonable doubt of his having been present at the time and place of the crime." In Ohio the defendant is not required to establish the *alibi* by a preponderance of evidence. In accordance with the rule adopted in *Walters v. State*, 39 O. S. 215, the jury should be charged that they must consider all the evidence in the case, including that relating to the *alibi*, and determine from the whole evidence whether it was shown *beyond a reasonable doubt* that the defendant committed the crime with which he is charged. The burden of proof is not changed when the defendant undertakes to prove an *alibi*, and if, by reason of the evidence in relation to the *alibi*, the jury should doubt the defendant's guilt, he would be entitled to an acquittal, although the jury might not be able to say that the *alibi* was fully proved." *Toler v. State*, 16 O. S. 583; 1 Bishop's Cr. Pr., Sec. 1061-1068; Whart. Cr. Ev., Sec. 333. See also fully Thompson's Trials, Sec. 2436.

No. 180. Flight of defendant—Consideration of, by jury.—The flight of a person immediately after a crime is committed with which he is charged is a circumstance in establishing his guilt, not sufficient of itself to establish his guilt, but a circumstance which the jury may consider in determining the probabilities for or against him, the probability of his guilt or innocence. The weight to which that circumstance is entitled is a matter for the jury to determine in connection with all the other facts and circumstances called out in evidence on the trial of this case.

From Nye, J., in *State v. Dedrick*, Loraine Co. Com. Pleas. This substantially follows an instruction approved in *People v. Forsythe*, 65 Cal. 102.

Flight of accused in the absence of a good motive is competent evidence. It is not necessary to show that the flight was on account of the charge. *State v. Frederick*, 69 Me. 400. Flight raises a presumption of guilt. *State v. Gee*, 85 Mo. 647; *State v. Brooks*, 92 Mo. 542.

Abbott, J., in *Donnall's Case* (Trial of Robert Saule Donnall, London, 1877), charged the jury that, "a person, however conscious of innocence, might not have the courage to stand a trial; but might, although innocent, think it necessary to consult his safety by flight." *Kennedy v. Com.*, 14 Bush. 341, is an authority against admission of explanatory matters as to flight, but the accused may certainly explain.

No. 181. Consideration of improper unanswered questions by jury.—Gentlemen of the jury, some questions have been asked of witnesses which were not permitted to be answered by them. The fact that questions have been asked should not be considered by you, except as they have been permitted to be answered by the witnesses. You should determine the case and the facts necessary to be proved to establish the guilt of the defendant from the evidence which has been permitted to be given to you and not thereafter excluded from your consideration.

D. J. Nye, Judge.

No. 182. Consideration of admitted facts stated in affidavit for continuance.—The defendant in this case made a motion for continuance stating as the reason therefor that one G. W. was a material witness for him, and without whose testimony he could not safely proceed to trial. In this affidavit he sets forth, as required by law, what he expects G. W. would testify to if present as a witness. The state, by its prosecuting attorney, says, to prevent a continuance of the case, that he will admit that if G. W. were here he would testify to the facts stated in the affidavit.

For the purpose of this case then you are instructed that you may consider that affidavit as the testimony of the witness G. W. the same as if he were here, and the weight which you will give that testimony is left entirely to your discretion.

D. J. Nye, Judge.

No. 183. Conflict in testimony—How treated.—When there is conflict between witnesses in their testimony, the rule for guidance of the jury is that preference should be given to that witness who has the least inducement from interest or other motives to testify falsely. Again, in determining which of the witnesses are worthy of credit, you should consider whether each statement is probable or improbable. You are not obliged to believe the statement or statements of any witness who testified before you merely because the witness made such statement or statements. You have a right, in the exercise of your intelligence and in the light of your experience, to consider whether the statement or statements accord with the probability of truth. And, again, in passing on the credit of the witness, you should consider whether any of the witnesses have been impeached.

Pugh, Judge, in *State v. Abbott, et al.*, Franklin County Com. Pleas.

No. 184. Record evidence of deed—As to its due execution—Prima facie evidence.—The defendant has put in evidence a record from the Recorder's office of Trumbull County, purporting to be a record of the paper writing in question, made by the proper officer. The law has provided for the keeping of this record, and has made it *prima facie* evidence of the execution of the deed; and by this evidence the defendants gave *prima facie* proof that the paper writing is in law the deed and conveyance of J. N., deceased.

a. *It may be rebutted.*—

By "*prima facie*" evidence, the court means evidence sufficient to establish this fact in the absence of other proof

countervailing it; but the record given in evidence to prove the execution of the paper writing purporting to be a deed, as I have said, is *prima facie* evidence only, which may be rebutted by other evidence by which it may be shown that the writing which was recorded was, in fact, lacking in all or any of the qualities necessary to the due execution of the writing purporting to be the deed.

Evidence has been given for the purpose of impeaching this writing in several respects, and evidence has been given with a view to rebut this impeaching evidence and sustain the writing; and it is chiefly upon the effect of this evidence for and against the writing in question that the parties are now at issue before you.

It is competent for the plaintiff in this manner to impeach the execution of this instrument; or in other words, it appears in evidence that upon the first day of April, 1891, that J. N., the father of the plaintiff, conveyed the land in question to the defendant by deed of that date, and for the consideration, as expressed in the deed, of six thousand five hundred dollars. The plaintiff seeks to avoid the effect of this deed by showing that J. N., at the time he made and executed the deed, had not sufficient mental capacity to make and execute the same.

Gillmer, J., in *Norris v. Western Reserve Seminary, etc., Trumbull Co. Com. Pleas.* Affirmed by Circuit Court.

No. 185. Mental capacity of grantor to make deed.—The law presumes that J. N., the grantor, had sufficient capacity to make such a deed, and therefore the burden is upon the plaintiff to show by a preponderance of the evidence, before he can recover, that J. N., the grantor, had not sufficient mental capacity to make the deed or instrument in question.

Before a man can legally convey his property, he must have memory. A man in whom this faculty is totally extinguished can not be said to possess understanding to any degree whatever, or to any purpose, but his memory may be imperfect, it may be greatly impaired by age or disease, he may not be able at all times to recognize the names of persons or families of those with whom he has been intimately acquainted; and he may at times ask and repeat questions that have been answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life, including the disposal of his property.

The question is not so much what was the degree of memory possessed by the grantor, as it is this: Did he have the requisite mental capacity, and was he a free agent in

making the conveyance at the time he is said to have executed it?

The power to make a valid deed is not destroyed or lost by old age alone; nor is it denied to him who has attained the utmost verge of life. Old age does not always or necessarily extinguish the light of intellect. It is in some men more brilliant than it is in others at much earlier age. The law looks only to the competency of the understanding; neither age nor sickness, nor extreme distress or debility of body will be sufficient to render a deed invalid, provided the grantor at the time it was executed did know what was being done, and did understand the nature of the act, and did have sufficient mental capacity to execute the deed; but the age of the individual, if considerable, is of importance and should be carefully considered by you as bearing on this question.

An habitual inability to recognize neighbors and acquaintances would be strong evidence of a sunken intellect and should be carefully considered by you; but a few occasional instances of this kind may show in an old gentleman a memory weakened but not destroyed, impaired but not extinguished. The want of recollection of names is one of the earliest symptoms of decay of memory, but its failure may exist to a very great degree and yet the solid power of understanding remain. . . .

The court says to you as a matter of law that the mere opinions of witnesses are entitled to little or no weight unless those opinions are supported by good reasons founded on facts which warrant them in the opinion of the jury. If the reasons are frivolous or inconclusive, or if founded on a wrong basis, the opinions of such witnesses are of but little aid to the triers of the cause. Every man having sufficient mental capacity, and not under any undue influence, is the lawful disposer of his own property, and he has the right to dispose of it as may seem best to him.

If he has sufficient mental capacity it matters little to whom he disposes it; his ownership of the property entitles him to do with it as he chooses; and it matters not that the jury may think that it would have been better to have given it to his relatives.

If Mr. N., therefore, has the legal capacity, and as I have stated, if he was free from any undue influence, disposed of and conveyed the land in question to Western Reserve Seminary, of West Farmington, he had a perfect right to do so; and such an act should be sustained regardless of what the jury might think of the propriety of the disposition.

He must have had sufficient will-power to enable him to act

in accordance with plans discreetly framed; and if it should appear to the jury that he had before that time formed other plans for the disposition of his property, in all or in some important respects different from that which the paper writing in question purported to carry out, then you should consider this fact as bearing upon the question whether at the time the grantor made the deed in question he had sufficient mental capacity to do so.

You should also consider the evidence which has been offered, if any, in regard to other plans which the evidence may show that the deceased had previously formed, with regard to the disposition of his property, whether by will or otherwise, to the persons to whom he may at other times, if any, have determined to give his property,—if any such were shown, bearing upon this same question.

Gillmer, J., in *Norris v. Western Reserve Seminary, etc.*, Trumbull Co. Com. Pleas. Affirmed by Circuit Court.

No. 186. Parol evidence to vary written instrument.—It is well settled, as a general rule, that all parol—that is, verbal—negotiations between the parties to a written contract, such as a promissory note or other instrument anterior to, or contemporaneous with, the execution of the instrument, are to be regarded as either merged in it or concluded by it. Accordingly, parol evidence is incompetent to show terms or conditions at variance with, or in addition to, a written agreement which the parties agreed to verbally, prior to or at the time the contract was reduced to writing, but which were not inserted in the instrument. But to this general rule there are certain exceptions.

Thus, parol evidence is admissible to prove that the written agreement, or promise, was without consideration, or what the consideration in fact was; and parol evidence is admissible to show that the writing was never intended to operate as an agreement at all; that the writing was not accepted as the record of any contract.

E. P. Evans, J., in *Lillie v. Bates*, Sup. Court, No. 1636. See 3 O. C. C. 94; 26 O. S. 33.

No. 187. Reasonable doubt.—A reasonable doubt is an honest uncertainty existing in the minds of a candid, impartial, diligent jury, after a full and careful consideration of all the testimony, with an eye single to the ascertainment of the truth, irrespective of the consequences of their finding. It is not a mere speculative doubt, voluntarily excited in the mind in order to avoid the rendition of a disagreeable verdict.

Such a doubt is considered by the law as merely captious, and as an unreasonable one.

To acquit upon trivial suppositions and remote conjectures is, says an eminent jurist, a virtual violation of the juror's oath and an offense of great magnitude against the interests of society—directly tending to the disregard of the obligation of a judicial oath, the hindrance and disparagement of justice and the encouragement of malefactors. On the other hand the jury ought not to condemn, unless the evidence removes from his mind all reasonable doubt as to the guilt of the accused, and he would venture to act upon it in a matter of the highest concern and importance to his own interests.¹

A reasonable doubt "is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they can not say they feel an abiding conviction to a moral certainty of the truth of the charge."²

"A verdict of guilty can never be returned without convincing evidence. The law is too humane to demand a conviction while a rational doubt remains in the minds of the jury. You will be justified and are required to consider a reasonable doubt as existing if the material facts, without which guilt can not be established, may fairly be reconciled with innocence. In human affairs absolute certainty is not always attainable. From the nature of things reasonable certainty is all that can be attained on many subjects. When a full and candid consideration of the evidence produces a conviction of guilt, and satisfies the mind to a reasonable certainty, a mere captious or ingenious artificial doubt is of no avail. You will look, then, to all the evidence, and if that satisfies you of the defendant's guilt, you must say so. If you are not fully satisfied, but find only that there are strong probabilities of guilt, your only safe course is to acquit."³

¹ Judge Minshall, in the Giddings Trial.

² Approved in *Morgan v. State*, 48 O. S. 377, as given by C. J. Shaw in Webster case.

³ By Judge Birchard in *Clark v. State*, 12 Ohio, 495. Approved in *Morgan v. State*, 48 O. S. 377.

FALSE CLAIMS—MAKING OUT AND PRESENTING TO PUBLIC OFFICERS.

No. 188. False claim under R. S. Sec. 7075.—A false claim may be defined as one that is untrue. For example, if a claim is made for more bricks than were furnished, or for more labor in excavation than was done, such a claim is a false claim.

The word fraudulent involves a somewhat different idea. A fraudulent claim against the city may be defined as a false claim "gotten up or contrived by some person or persons with intent to present it for — payment, and thus to defraud" the city. You will perceive from these definitions that a false claim has not as many elements as a fraudulent claim. A false claim is not a fraudulent claim; but a fraudulent claim is a false claim and something more added. That is, it is a false claim gotten up or contrived by some person or persons with the intention, with the purpose, to present it for payment, and thus to defraud the party against whom it is preferred.

Pugh, J., in *State v. Abbott et al.*, Franklin Co. Common Pleas.

No. 189. Legal knowledge of a fact defined.—The term legal knowledge is used because legal is not synonymous with knowledge as it is understood in common or ordinary talk among men. Mere negligence, or the absence of ordinary business prudence, in the transaction of the business of constructing the sewer and in presenting the claims by the defendants, would not be equivalent to knowledge, it would not show that they had such knowledge, guilty knowledge. To warrant you in finding that the defendants, or either of them, knew that the claim was either false or fraudulent, you must be satisfied that they, or the ones against whom you so find, were aware of such facts or circumstances in relation to the claim, as would have created the belief in the mind of an ordinarily prudent and intelligent person that the claim was, in some respect, false or fraudulent.

"In criminal as well as in civil affairs, every man is presumed to know everything that he can learn upon inquiry, when he has facts in his possession which suggest the inquiry."

It is not true that a person is not chargeable with any more knowledge than he chooses to have; he is not permitted to close his eyes and ears, when he pleases, upon all sources of information, and then excuse his ignorance by saying that he did not, or does not, see or hear anything.

Making a still further application of this law to this case, if you find, from the evidence, that either or all of the defendants had knowledge or information of facts or circumstances in relation to this claim, which were sufficient to put an ordinarily prudent person upon inquiry, and which were of such a nature that the inquiry, if prosecuted with reasonable diligence, would certainly have led to the discovery that the claim was, in any respect, in any particular, false or fraudulent, then you may presume that he or they, as the case may be, knew the claim was thus false or fraudulent. That state of facts, if proved, may have the same force and effect as if it had been proved that he or they had actual knowledge of the false or fraudulent character of the claim.

Pugh, J., in *State v. Abbott*, Franklin County Common Pleas.

No. 190. Intent, proof of.—There can be no crime where there is no criminal intent. An act does not make the actor guilty unless his intent was criminal. This wise, just, and reasonable rule is firmly settled in the whole of the land, is widely known and approved among men, and is recognized and observed in every enlightened system of jurisprudence. When an act forbidden by law is proved to have been knowingly done, no further proof is needed on the part of the state to obtain a conviction in the absence of justifying or excusing facts, since the law in such a case *prima facie* presumes the criminal intent. It is not a conclusive presumption which shuts out explanation and justification on the part of the defense. The law infers the intent from the act and its character. Although the act forbidden by law was knowingly done, yet, if it was not done with a bad purpose, the defendant may rebut the *prima facie* presumption by showing that the act was done from a pure motive. Therefore, in this case, if the state has convinced you, to the exclusion of all reasonable doubt, that the defendants presented a false or fraudulent claim for payment to the director of accounts, knowing it to be false or fraudulent, the intent to cheat and defraud would be *prima facie* presumed against such of the defendants as did that, and the state was not required to offer proof to show intent.

But if the facts and circumstances preceeding the act, or

contemporaneous with and being part of the transaction itself, as disclosed by the evidence, showed that the claim was presented from a pure motive, that is rebuttal of the presumption of intent. The *prima facie* case made by the state in such an instance and in that way does not take away the presumption of innocence from the defendant, or deprive him of a reasonable doubt in the minds of the jury. The indictment charges only an intent to defraud. It is not necessary, therefore, that the state should have proved that the city had been actually defrauded. If you are convinced that the defendant knew the false or fraudulent character of the claim when it was presented, you are not obliged to look further than that to find the intent to cheat and to defraud on the part of the defendant.

Pugh, Judge, in *State v. Abbott, et al.*, Franklin County. Indictment for presenting false vouchers. This may be so framed to meet any case upon the question of intent.

FALSE IMPRISONMENT.

No. 191. False imprisonment — Defined.—Trespass to the person is an injury committed by one person upon another with violence actual or implied, known in law as false imprisonment. To constitute the injury there are two points. 1. The detention of the person, and, 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment whether it be in a common prison or a private house, or even by forcibly detaining one in the street. Unlawful or false imprisonment consists in such confinement or detention without sufficient authority, which authority may arise from some process from the courts of justice, or from some special cause warranted from the necessity of the thing, such as the arrest of a felon by an officer or a private person without warrant.

E. P. Evans, Judge, in *Sohn v. Patton*, Franklin County Com. Pleas. See Kinkead's Code Pldg., Sec. 560 *et seq.* Cooley on Torts (2d. Ed.), p. 195, *et seq.* Any deprivation of the liberty of another, without his consent, whether it be actual violence, threats or otherwise, constitutes an imprisonment within the meaning of the law.

No. 192. Same continued—Arrest and imprisonment—What constitutes.—To constitute an arrest and imprisonment it is not necessary that the party making the arrest should actually use violence or force toward the party arrested, or

that he should even touch his body.¹ If he professes to have authority to make the arrest, and he commands the person by virtue of such pretended authority to go with him, and the person obeys the order, and they walk together in the direction pointed out by the person claiming the right to make the arrest, this constitutes an arrest and imprisonment within the meaning of the law.

Any deprivation of the liberty of another without his consent whether it be by actual violence, threats, or otherwise constitutes an imprisonment within the meaning of the law.²

¹ Cooley on Torts, 169; Addison on Torts, Sec. 799.

² From *Sohn v. Patton*, Franklin County Com. Pleas, E. P. Evans, Judge. Manual seizure is not necessary to constitute an arrest. *Hill v. Taylor*, 50 Mich. 549. "It is the fact of compulsory submission which brings a person into imprisonment." *Brushaber v. Slegemann*, 22 Mich. 266. As to what constitutes imprisonment see Cooley on Torts, pp. 195-6.

No. 193. Same continued—Arrest by officer without warrant—When.—It is expressly provided by statute in Ohio (R. S. Sec. 7130) that when a felony has been committed, any person, whether an officer or a private person, may without warrant arrest another whom he believes, and has reasonable cause to believe, is guilty of the offense and may detain him until a legal warrant can be obtained, and the statute further provides that a sheriff, deputy-sheriff, constable, marshal, or deputy-marshal, watchman, or public officer shall arrest and detain any person found violating any law of the state, or any legal ordinance of a city or village, until a legal warrant can be obtained.

From *Sohn v. Patton*, Franklin County Common Pleas; Evans, Judge. See Cooley on Torts (2d. Ed.), pp. 199, 201, 202, 203. A right of arrest exists where there are well-grounded suspicions of felony. *State v. West*, 3 O. S. 509. Where misdemeanor is committed within presence of officer he may arrest without warrant. *State v. Lewis*, 50 O. S. 179. Marshal's power to arrest without warrant. R. S., Secs. 1849, 7129; *Ballard v. State*, 43 O. S. 340.

No. 194. Same continued—Distinction between felonies and misdemeanors.—The distinction between felonies and misdemeanors in this state is this: Offenses which may be punished by death or by imprisonment in the penitentiary are felonies; all other offenses are misdemeanors.

From *Sohn v. Patton*, Franklin County Common Pleas; Evans, Judge.

No. 195. Same continued—Arrest of witness without process.—There is no law in Ohio which authorizes an officer to arrest, without process, a witness and hold him until he gives bond. If the plaintiff therefore was arrested and im-

prisoned as a witness only until he gave bond for his release, such arrest and imprisonment was unlawful, and is what the law denominates false imprisonment.

From *Sohn v. Patton*, Franklin County Common Pleas, Evans, Judge.

No. 196. Same continued—Liability of several arresting officers.—If the jury find from the evidence that the plaintiff has been falsely imprisoned as alleged in his petition, and that he was thus falsely imprisoned by the joint acts of several wrong-doers, then such wrong-doers are jointly and severally liable for such joint act, and the plaintiff is under no obligation to sue all such wrong-doers, but he may at his election proceed against any one or more of them. If you shall find from the evidence that officers N. and B., and they alone, falsely arrested and imprisoned the plaintiff at the time in question, still if the evidence shall further show by a preponderance thereof that the defendant E. was then present and acting in concert with the said N. and B., and was wrongfully inciting them to arrest or imprison the plaintiff, then the defendant E. is equally liable with the said N. and B., and if N. and B. are guilty of falsely imprisoning the plaintiff, then the defendant E. is equally guilty if he procured them to so imprison the plaintiff, or if he aided or abetted them in so doing. If you shall find from the evidence that officers N. and B., and they alone, arrested and imprisoned the plaintiff, and that the defendant E. was present at the time of said arrest and imprisonment, still if you shall find that the said E. did not procure the plaintiff to be so arrested or imprisoned, or that he did not in any way aid, abet, or assist in the arrest and imprisonment, or advise or encourage it, then he is not guilty.

From *Sohn v. Patton*, Franklin County Common Pleas, Evans, Judge.

No. 197. Same continued — Damages recoverable.—If you shall find that the defendant is guilty as charged in the petition, he is liable to the plaintiff for such damages as the law denominates compensatory, although he may have acted in good faith and in the honest belief that he was discharging his duty as an officer; but if you shall find that the defendant arrested and imprisoned the plaintiff maliciously, then the defendant is liable to the plaintiff for compensatory damages, and you may, if you see proper, also assess further damages as smart money, that is, exemplary damages. The compensatory damages are allowed to compensate the plaintiff for the actual injury he has sustained. Exemplary damages are given as smart money in the way of pecuniary punishment.

If you find for the plaintiff, you should allow him full compensatory damages, that is, such as will fully and reasonably compensate him for the injury he has sustained. The elements for which compensatory damages may be allowed include pain and suffering, if any, both mental and physical, the loss of time, if any, in consequence of such false imprisonment, and injury, if any, to the reputation or social position, as well as for shame and mortification caused by the false imprisonment; and also reasonable attorney's fees to the plaintiff for the services of the attorneys in the prosecution. And if you find that the defendant not only falsely, but that he also maliciously, imprisoned the plaintiff, then you may allow the plaintiff, in addition to compensatory damages, such further sum by way of exemplary damages as you in your judgment may think just and proper in view of all the evidence and circumstances.

But if you should find from the evidence that the defendant is guilty as charged, but that in making the arrest complained of, and in the detention of the plaintiff, the defendant acted in good faith and without malice, then such fact should be considered by the jury and the damages awarded should be confined to compensatory only. Exemplary damages should not be allowed against an officer who makes or causes an illegal arrest unless he acts in bad faith, or is guilty of some oppression or misconduct.

From *Sohn v. Patton*, Franklin County Common Pleas, Evans, Judge.

FRAUD—FALSE REPRESENTATIONS, Etc.

No. 198. Fraud is never presumed.—"The court instructs the jury that fraud is never presumed, but must be clearly proved, to entitle a party to relief on the ground that it has been fraudulent; and the presumption of law is that the business transactions of every man are done in good faith and for an honest purpose; and anyone who alleges that such acts are done in bad faith, or for a dishonest purpose takes upon himself the burden of showing, by specific acts and circumstances tending to prove fraud, that such acts were done in bad faith."

Fraud may be presumed to the extent that the law presumes to intend the natural results of his acts. *Jameson v. McNally*, 21 O. S. 295, 304. Never presumed. *Lake v. Doud*, 10 O. 415, 420; *Bohart v. Atkinson*, 14 O. 228, 239; *Landis v. Kelly*, 27 O. S. 567, 569; *Cooley on Torts*, 556. As to

distinction between fraud in fact and fraud in law, see Thompson on Trials, Sec. 1930, *et seq.* Situations in which law presumes fraud. *Id.*, Sec. 1936. What is called fraud in fact, is always a question of fact for the jury. *Id.*, Secs. 1940, 1945.

No. 199. Remedies for fraud.—Fraud is never presumed by law, but must be proven. But where there has been such a fraud committed, as is charged in the petition, the law gives the defrauded party two remedies. He may, at his option, rescind the whole transaction and demand that the parties be restored to their original relations, or he may keep the property he has received and sue for the difference between its real value and that amount which he has paid for it. He has adopted, in this case, the latter course, and he enters suit for that difference from what he says was the real value of the property.

Calvin D. Wright, Judge, in *Randolph v. Ammon*, 51 O. S. 585. The vendor may on discovery rescind the sale and sue for the value of the property. *Thurston v. Blanchard*, 22 Pick. 18; 33 Am. Dec. 700; *Moody v. Blake*, 117 Mass. 23; 19 Am. Rep. 394; or affirm the bargain and sue and recover damages for the fraud. *Cooley on Torts*, 589, and cases. He must restore goods or consideration. *Curtiss v. Howell*, 39 N. Y. 215; *Guckenheimer v. Angewine*, 81 N. Y. 394; *Bartlett v. Drake*, 100 Mass. 176; 97 Am. Dec. 92. As to remedy for fraud and deceit, see fully Kinkead's Code Pleading, Sec. 606.

No. 200. Fraudulent representations explained and defined—Fraud on old person—How proven—May be inferred.—It is claimed that the fraudulent means used were practiced in part upon the plaintiff and in part upon the father, who, by reason of his great age and enfeebled condition of body and mind at the time, was unable to protect himself against the alleged fraud and fraudulent practices of the defendant, as alleged in the petition. On this subject I say further to you, gentlemen, that fraud, though it is not presumed in such a case as this, but must be proven, yet it may be proven either by direct or circumstantial evidence; that is, by the proof of certain collateral facts, from which the existence of fraud may or should be inferred. It may be drawn from collateral facts which are proven in the case. One of the curious things about fraud is it can not be defined, it has so many and varied shapes that no single definition can cover them all; and it is well that it is so, because, if it had a legal definition, evil disposed persons would suit that definition and go perpetrating fraud, and would also ascertain the means to escape the consequences. Fraud, although it is not presumed, yet it may be inferred from collateral facts which are proven, and it may be then but an inference from these collateral facts.¹

¹ John D. Nicholas, Judge, in *Albright v. Thompson*, 27 W. L. B. 247. Judgment affirmed. See cases ante, No. 198.

We might go further and say: To constitute a cause of action for fraudulent representations, there must be bad faith. If the representations when made were believed to be true, and the facts of the case were such as to justify the belief, there is no fraud or deceit, and there can be no recovery.²

A representation is false and will furnish ground for recovery whether the party knew it to be false or not, if he had no reason to believe it to be true when made, and it was done with the intention of inducing the person to whom made to act upon it, and the latter does so and sustains damage, there may be a recovery.³

² Taylor v. Leith, 26 O. S. 428.

³ Ætna Ins. Co. v. Reed, 33 O. S. 283.

No. 201. False representations without knowledge of their truth or falsity.—“Although you may find from the evidence that defendant did not know that said representations were untrue, yet, if you believe from the evidence that, pending the negotiations for the purchase of said land, and for the purpose of effecting the trade and inducing said agent to make it, defendant made said representations as of his own knowledge (and they were untrue), but did not know whether they were true or false, and knew or had reason to believe that said agent relied on said representations as true, and said agent did so rely on them, and was thereby deceived and induced to trade for or purchase said land, you will find for the plaintiff.”

From Caldwell vs. Henry, 76 Mo. 254, 256

“If the party (defendant) made the representations not knowing whether it was true or false, he can not be considered as innocent; since a positive assertion of a fact is, by plain implication, an assertion of knowledge concerning the fact. Hence, if a party (if the defendant) have no knowledge, he has asserted for true what he knew to be false.” Insurance Co. v. Reed, 33 O. S. 294; Bigelow on Fraud, 61; Stone v. Covell, 29 Mich. 359, and cases cited; Woodfull, 27 Ind. 4; Fisher v. Mellen, 103 Mass. 503; Taylor v. Ashton, 11 M. & W. 400; Nugent v. R. R. Co. 2 Disn. 302. 5 Law-son's R. & R., Sec. 2352, and cases; Jaggard on Torts, p. 565 (2d. ed. p. 582).

No. 202. Ingredients of actionable fraud—Intention to deceive—Puffing and commendation—Complainant must be misled.—**FIRST.** Telling a bare, naked lie is not actionable in and of itself. One of the ingredients of an actionable fraud is, that the falsehood must be asserted with the intention that another shall believe it true and act upon it; and such intention is fraudulent, whether the person asserting the falsehood knew that it was false, or recklessly stated it to be true, not knowing whether it was true or false.”¹

¹ 33 O. S. 283. See ante, No. 201 note.

"SECOND. The party asserting the falsehood must, at the time, intend to deceive. Fraud usually consists in intention."

"THIRD. The falsehood must be not only in something material, but it must be in something in regard to which the one party places a known trust and confidence in the other. For if the falsehood be of such a nature that the party deceived by it had no right to place reliance upon it, and it was his own folly, in consequence of his not exercising common sense and ordinary discretion and sagacity, he can not maintain an action for the injury.² Thus where a party, upon making a purchase for himself and his partners, falsely stated to the seller, to induce him to make the sale, that his partners would not give more for the property than a certain price, whereas, in truth, they expected and intended to give more, it was held that it was the seller's own indiscretion to rely upon such false assertions. The common language of puffing and commendation of articles, in relation to such things as are equally open to the observation, examination and skill of both parties, and upon which it is understood that every buyer exercises his own judgment, comes within the rule above laid down; inasmuch as no one is supposed to be deceived by such false assertions. A confidential relation must exist between the parties."

"FOURTH. The false statement must be made to, or it must have been intended to operate upon, the party complaining."

"FIFTH. The party complaining of the deceit must be misled by the falsehood; for if he knows the assertion to be false when made it can not be said to influence his conduct."

"SIXTH. The falsehood must constitute an inducement or motive to the act or omission of the party deceived."

"SEVENTH. The party deceived must be misled to his injury; a damage must result from the party deceived acting on the faith of the falsehood. . . . In general, when the promisee is induced, by false and fraudulent representation, to enter into a contract that manifestly would not have been made, except on the faith that such false representations were true, and being false, affected substantially his rights, he may repudiate such contract.⁵

² See ante, No. 199.

³ Edwin T. Hamilton, Judge in *Cleveland Rolling Mill Co. v. Joseph*, S. C. 2913, *Cuyahoga Co.* Quoting from *Swan*.

No. 203. Misrepresentation by concealment.—It is not necessary that false representations be by express words, but

they may be by mere concealment of material facts under such circumstances as make it the duty of the party to speak. Suppression of the truth where there is a duty to speak is as much a legal wrong as a positive falsehood, and is actionable. If, however, there is no duty to disclose, failure to tell the truth is not actionable fraud.

Jaggard on Torts, 575-77. Words not necessary. Cooley on Torts, 558, 565.

No. 204. Complainant must have relied upon representation—Damages must be shown—Representations to be substantially proven.—To entitle the plaintiff to recover in this case, she must prove that the defendant made representations to her, and to the father; that she and the father relied upon them; that whether, under the circumstances existing at the time, she had a right to rely upon those made to her. She must further prove such misrepresentations were false when made, and known to be so when made. She must further prove she was damaged, and pecuniarily injured thereby. If she proves these things, she will be entitled to recover; otherwise she will not. Look into the evidence then and determine—first, what representations he did in fact make. What representations to herself, and what to her father, either verbally or in writing, or in both. If none were made, that would end the case. But, if any were made, you must determine from the evidence what they were. It is not necessary you should find that he made each and all of the representations set forth in the petition, exactly as set forth therein, but it will be sufficient if you find he made substantially these representations.

(a) Must have right to rely on them.

If you find he made substantially such representations as alleged, you will then inquire whether she relied upon them. And if you find she did, you will then inquire whether, under the circumstances then existing, she had a right to rely on them;¹ and here I will say to you, if you find she resided in — at the time, and he and the father resided here, and correspondence was opened between them, and he wrote to her in a brotherly spirit, and intimated a disposition to protect her interests in the premises, then she had a right to rely on them. If you find she had no right to rely on the representations, she then would have no right to recover. But if you find she had a right to rely on them, you will inquire, were the representations so made, false, and

¹See Cooley on Torts, 577.

if they were not, she can not recover, because she couldn't recover for fraudulent representations. If the representations were true, if they were not false, she can not recover. If they were false, you will then inquire, were she and the father deceived by them. If they were not, she can not recover. But if they were, and you so find, you will inquire, was she damaged then, or did she suffer pecuniary injury from these representations. If not, she can not recover. But if she did, and you so determine, she would be entitled to recover damages for such injuries as she has shown by the evidence, she has sustained thereby.²

² John D. Nicholas, Judge, in *Albright v. Thompson*, 27 W. L. B. 247. Judgment affirmed.

There is no liability if buyer relied on his own knowledge. *Wilkinson v. Root*, W. 686. A representation of what will or will not be permitted to be done, is one on which the party to whom it is made has no right to rely; and if he does so rely, it is his folly, and he can not ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such. *Fish v. Cleland*, 33 Ill. 243; 33 O. S. 293.

Representations must have been acted upon. *Cooley on Torts*, 587.

No. 205. Must be material.—"In the first place, it is obvious that the fraud must be material to the contract or transaction which is to be avoided because of it; for if it relates to another matter, or to this only in a trivial and unimportant way, it affords no ground for the action of the court. It must therefore relate distinctly and directly to this contract, and it must affect its very essence and substance. But, as before, we must say that there is no positive standard by which to determine whether the fraud be thus material or not. Nor can we give a better rule for deciding the question than this: if the fraud be such that had it not been practiced the contract would not have been made, or the transaction completed, then it is material to it; but if it be shown or made probable that the same thing would have been done by the parties in the same way if the fraud had not been practiced it can not be deemed material. Whether the fraud be material or otherwise seems to be, on the decided weight of authority, a question for the jury and not a question of law; but it is obvious that in many cases the jury can not answer this question without instructions from the court."

Edwin T. Hamilton, Judge, in *The Cleveland Rolling Mill Co. v. Joseph, et al.* S. C. No. 2913, Cuyahoga County. Quoted from 2 *Parsons on Contracts*, p. 769 (5th Ed.). Must be material. *Ins. Co. v. Reed*, 33 O. S. 283; *Connersville v. Wadleigh*, 47 Am. Dec. 214. It must be a representation giving occasion to the contract. *Adams v. Schiffer*, 11 Col. 15; 7 Am. St. R. 202; *Pulsford v. Richards*, 17 Beav. 96. See *Cooley on Torts*, 580. They need not form the sole inducement; it is enough that they have formed a material inducement. *Matthews v. Bliss*, 22 Pick. 48; *Safford v. Grout*, 120 Mass. 20; *Fishback v. Miller*, 15 Nev. 428; *Cooley, Torts*, 587.

No. 206. Contract must be rescinded and tender made—Money or thing must be returned—Tender back of stock.— If the plaintiff recovers, it is on the ground that the contract is set aside for fraud; but when a party wants to have that done, and to have his money returned, he must also return what he received from the other party for his money. In order for the plaintiff to recover in this case, even if he has made out the fraud he claims, it was incumbent on him to return or tender back to the company the certificate of stock he had received. If he did not do this, he can not recover, and to make such a tender sufficient it was necessary to produce the certificate and offer it to the representative of the company, unless the production and offer of it was waived by such representative.

Gentlemen: The plaintiff asks me to charge you on the subject of tendering back the certificate of stock referred to, before this action was commenced, and as to what would amount to a proper tender, and I say to you that if at Mr. G.'s office, H. was present as the representative of the defendant, and Mr. G., as the attorney of the plaintiff, told H. the reasons why M. desired the cancellation of his stock, and demanded that the company take back the stock and return M. his money, and if Mr. G. had the certificate of stock there ready and willing to return it, but was deterred from making an actual tender of the certificate, because H. denied the reasons and refused to take back the stock or entertain the proposition, then it was not necessary for the plaintiff to make such actual tender of the certificate by formally producing it and tendering it to H.

From *The Cleveland Crucible Steel Co. v. Murdock* (S. C.), Cuyahoga County.

No. 207. Fraudulent purchase of goods — Complete charge as to—What constitutes fraud—Generally.—A falsehood, to amount to a legal fraud, must be accompanied by the following circumstances: 1st. The party asserting the falsehood must know at the time he makes the assertion that it is a falsehood. Hence, when a person asserts a thing which he believes to be true, but which in fact is false, he is not liable therefor by reason of the fact that it is false, though another may be injured and deceived thereby, though if he state that to be true about which he has no knowledge and no reason to believe is true, and it is false in fact, then we may well question his belief in its truth, and it may be equivalent to stating that which he knows to be false. 2d. The party asserting the falsehood must at the time intend to

deceive. 3d. The falsehood must be not only in something material, but it must be in something in regard to which one party places a known trust and confidence in the other. 4th. The false statement must be made to or it must have been intended to operate upon the party complaining. 5th. The party complaining of the deceit must have been misled by the falsehood. 6th. The falsehood must constitute an inducement or motive to the act of the party deceived. 7th. The party deceived must be misled to his injury. A damage must result from the party deceived acting on the faith of the falsehood.

From *Wilmot v. Lyon*, 49 O. S. 296. "The charge given was a correct statement of the law applicable to the case and is approved." *Id.*

No. 208. Same continued — Fraudulent purchase of goods—Vendor may abide by or rescind contract.—The principal question, then, which will claim your attention is, was the purchase of the goods in controversy in this action fraudulent? If it was, then these plaintiffs had the right, on the discovery of the fraud, either to abide by the contract of sale or to treat the contract as wholly void and of no effect—that is, as if it had never been made, so far as the parties thereto and this defendant are concerned—provided they acted promptly upon the discovery of the fraud; and in the latter case, on election by them so to do, plaintiffs had the right to avoid the contract and pursue and take or replevin their goods. If they have done this and there was fraud in the sale, then they are entitled to your verdict. But if there was no fraud in this sale, then the company was the sole and complete owner of these goods on the completion of the sale, without the power of revocation on the part of these plaintiffs, and the defendant is entitled to your verdict.

From *Wilmot v. Lyon*, 49 O. S. 296, where the charge was expressly approved.

No. 209. Liability of corporation for fraudulent representations of agents.—A corporation necessarily acts through its agents and is as much, and no more, bound by the false and fraudulent representations of its authorized agents as an individual; and both are bound by the authorized acts of his or its agents. If the directors of a company, acting as a body in the course of managing its affairs, or in the course of business which it is their duty to transact, induce a man, by false and fraudulent representations, to enter into a contract for the benefit of the company, the company is bound. But a company or corporation is not bound by the statement of one

of its stockholders, or of one of its directors or officers, unless he also was an agent of the corporation and authorized to make statements in its behalf.

From *Wilmot v. Lyon*, 49 O. S. 296, approving the charge.

No. 210. Liability of principal for acts of agent.—But no man can adopt and take the benefit of a contract entered into by his agent, and repudiate the fraud on which the contract was based. If the agent at the time of the contract makes any representation touching the subject matter, it is the representation of his principal. The principal can not separate the contract itself from that by which it was induced; he must adopt the whole contract, including the statements or representations which induced it, or must repudiate the contract altogether.

From *Wilmot v. Lyon*, 49 O. S. 296. Charge approved.

No. 211. Same continued—Fraudulent representations made in purchase of goods for principal—Liability.—If the principal sends his agent into the market to buy goods for him on the principal's credit, I think the agent may, at least in the absence of instructions, be fairly held to be authorized to make statements as to the credit and financial condition of his principal. True, he would not in such case be authorized to make any but truthful statements. Yet, being authorized to represent his principal's credit and financial standing, if he does make false and fraudulent statements as to material facts to the seller, and thereby induces a person who rightfully relies upon them to part with his goods by a sale to the principal, that principal can not honestly or legally retain the goods thus obtained by fraud from the seller, if the seller, on discovery of the fraud, promptly repudiates the contract of sale and demands a return of the goods, the seller at the same time returning or offering to return anything which he may have received in exchange therefor.

From *Wilmot v. Lyon*, 49 O. S. 296. Charge approved.

No. 212. Fraudulent concealment in the sale of goods.—“A contract for the purchase of goods on credit, made with intent on the part of the purchaser not to pay for them is fraudulent; and if the purchaser has no reasonable expectation of being able to pay, it is equivalent to an intention not to pay. But where the purchaser intends to pay, and has reasonable expectations of being able to do so, the contract is not fraudulent, although the purchaser knows himself to be insolvent, and does not disclose it to the vendor who is ignorant of the fact.”

If, when the agreement of purchase was made, there was a fraudulent concealment, within the definition already given, on the part of the company of their insolvency, knowing themselves to be insolvent, it would still be fraudulent. When a party thus enters into negotiations for the purchase of goods, and offers to buy or is content to buy upon application, and gives his promise to pay, in my judgment, whether he says anything about it or not, it is understood by both parties that he has a reasonable expectation of being able to pay—whether he says so in words or not.

Whether, therefore, a contract of purchase, where the purchaser fails to disclose his known insolvency is fraudulent or not depends on the intention of the purchaser; and whether that intention was to pay or not to pay is a question of fact and not a question of law. Being a question of fact, it is for your solution from the evidence in the case.

In the solution of this question, though it be one of fact, it is true, however, that certain presumptions arise which are entitled to consideration and force. Thus, while it may be said that fraud must be proved and will not be presumed—and I may say here that fraud is not to be presumed—it is a subject of proof. The proof need not be, however, positive of declared fraud, but it must be gathered from all the circumstances in the case. Thus, while it may be said that fraud must be proved and will not be presumed, there is a presumption that every reasonable person anticipates and intends the ordinary and probable consequences of known causes and conditions. Hence, if a purchaser of goods has knowledge of his own insolvency, and of his inability to pay for them, his intention not to pay should be presumed. I would go a step farther and hold that an insolvent purchaser, without reasonable expectations of ability to pay, should be presumed to intend not to pay. Indeed, an intention not to pay might be inferred from the mere fact that the purchaser had undisclosed knowledge of his gross insolvency; but, in such case, the inference may be rebutted by other facts and circumstances.

It is claimed that in good morals a purchaser knowing himself to be insolvent should not accept credit from one ignorant of the fact. Whether this proposition be true or not it is enough to say that the law, in its practical morality, does not afford a remedy for the violation of every moral duty. While, therefore, a purchase of goods by an insolvent vendee who conceals his insolvency with intent to injure the vendor is fraudulent and voidable, yet a purchase under like circumstances, save only that such intent is absent, is not in law fraudulent.

The simple failure to disclose the fact (of insolvency), however, is not equivalent to its concealment. The latter implies a purpose—a design; the former does not. If, then, such knowledge on the part of the purchaser be necessary to make out a fraud, it is because it becomes the predicate of an intent—and intent to injure.

Now, gentlemen, what do you say upon all the facts of this case? Was this company insolvent at the time of this purchase? Did they know it, and did they conceal? Having no reasonable expectation that they would be able to pay for the goods, did they conceal the fact of that insolvency? If they did, then I say to you, whether they said anything at the time or not, did any other act of concealment or artifice or not, the simple concealment of those facts, that they were insolvent and that they did not intend to pay, is enough to make an actionable case, and to vitiate and avoid the sale. If they had an honest belief in their solvency, an honest belief that they could turn these goods and pay for them, and expected to do it, then, whether insolvent or not, the sale was not a void one.

As given by Hamilton, J., in *Wilmot v. Lyon*, 49 O. S. 296, and founded on *Talcott v. Henderson*, 31 O. S. 162. The charge was vigorously attacked, but the Supreme Court said that as given it was a correct statement of the law applicable to the case. As to proof of intent see *Oswego Starch Factory v. Landrum*, 27 Iowa 573. A man intends the natural results of his acts. *Arnold v. Maynard*, 2 Story 353. For cases holding contrary to the charge, but which were considered by the Supreme Court both in the *Talcott* and *Wilmot* cases and not followed, see *Nichols v. Penner*, 18 N. Y. 295-300; *Lupin v. Marie*, 6 Wend. 77; *Conyers v. Ennis*, 2 Mass. 236; *Mitchell v. Worden*, 20 Barb. 253; *Smith v. Smith, Murphy & Co.*, 21 Penn. 367; *Hennequin v. Naylor*, 24 N. Y. 139; *Bidault v. Wales*, 20 Mo. 546; *Powell v. Bradlee*, 9 Gill and John, 220-276.

No. 213. Liability of mercantile agency for false reports or representations as to financial standing.—I also say to you, as requested, that if the statement given to the — Agency was substantially true, as claimed by defendants, and it was the sole representation which came to the plaintiffs, and that only through the Agency, then, in so far as the plaintiffs' claim depends upon alleged fraudulent oral or written representations, no recovery can be had by plaintiffs. But if you find the statement was made to the Agency, and that it was false in whole or in part, then inquire whether it was given with the intent on the part of the company to have it used as a continuing representation among the patrons of the Agency for the purpose of obtaining credit for the company by showing its financial standing until it should be otherwise changed or modified by the company. And to determine this, look to the character of the statements themselves; see

whether the facts detailed were liable to change by lapse of time, or were they of a permanent nature? What was the custom and usage of the Agency in treating them as continuing or otherwise? And what knowledge of such custom had the company? What other reports, if any, did the company make to the Agency covering the facts of the original statements of 1880? And if you shall find it was not intended or designed to be a continuing statement, then I say to you, whether true or false, it was too remote in point of time to authorize plaintiffs or anyone else, nearly four years after, to rely upon its statements, and can not be the foundation of recovery in this case. But if you find it was intended and designed by the company as a continuing representation, and was in fact so used, to the knowledge of the company, then apply to it the rules of law already given, and the facts as you shall find them to be, and determine whether the representations therein contained were so used as to render this sale fraudulent.

No. 214. Replevin of property by vendor from assignee of vendee on ground that vendee was insolvent and did not intend to pay for same.—The questions for your consideration and determination are: 1. Was plaintiff at the time of the commencement of this action the owner of, and entitled to the possession of the property described in the petition or any part thereof? 2. What was the value of said property at the time of the commencement of this action? 3. Did the defendant, H., assignee, unlawfully detain from plaintiff the possession of said property or any part of it? 4. If he did so unlawfully detain said property, how much, if anything, were the plaintiff's damages by reason of such unlawful detention.

In determining the questions in this case it is important for you to consider the financial condition of W. at the time of the giving of the order to the plaintiffs in this case, for the shipment of the goods described in the amended petition which were shipped by the plaintiffs to the said W. on and after —, 18—, and his financial condition at the time of the shipping and receipt of the goods. . . . His financial condition before and after the date of the orders and the shipment of the goods is not conclusive as to his financial condition at the time of giving the order before shipping the goods, but evidence upon that point may be considered for the purpose of determining his condition at the time of giving the order, and at the time of the shipping and the receipt of the goods; and in this reference is made to the goods that

were shipped on and after —, 18—. On —, 18—, and with the dates of orders and shipments made thereafter, did W. have sufficient property to pay his debts in full? And if not, had he sufficient property so that he could pay his debts as they became due and payable? These are important matters for your consideration in determining whether or not W. was solvent or insolvent at the time of giving the order for said goods and at the time of receiving the same.

If you find from the evidence that W. at the time of giving the order for the goods that were shipped and received on and after —, 18—, had sufficient property to pay all his debts in full, then I say to you that there would be no fraud in ordering or purchasing other goods. But if you find that he had not sufficient property to pay all of his debts in full, then it will be important for you to consider and determine whether he was able to pay his debts and liabilities as they matured or became payable. Again, was W. in such a financial condition as to be able to pay, or have a reasonable expectation that he could pay for the goods purchased of the plaintiffs on or after —, 18—, when the bills therefor became due and payable?

You are instructed, as matter of law, that the intention on the part of the purchaser of goods not to pay for them, existing at the time of purchase and concealed from the vendor, is such fraud as will vitiate the contract.

But on the other hand where no such fraudulent intent exists, the mere fact that the purchaser has knowledge that his debts exceed his assets, though the fact be unknown and undisclosed to the vendor, will not vitiate the purchase.¹

Therefore, a contract of purchase where the purchaser fails to disclose his known insolvency, whether it is fraudulent or not, depends on the intention of the purchaser, and whether that intention was to pay or not is a question of fact for the jury to determine. While it may be said that fraud must be proved, and will not be presumed, there is a presumption that every reasonable person anticipates and intends the ordinary and probable consequences of known causes and conditions. Hence, if the purchaser of goods has knowledge of his own insolvency, and of his inability to pay for them, his intention not to pay may be presumed. An insol-

¹ "A contract for the purchase of goods on credit, made with the intent on the part of the purchaser not to pay for them, is fraudulent; and if the purchaser has no reasonable expectation of being able to pay, it is equivalent to an intention not to pay. But where the purchaser intends to pay and has reasonable expectations of being able to do so, the contract is not fraudulent, although the purchaser knows himself to be insolvent and does not disclose it to the vendor, who is ignorant of the fact." *Talcott v. Henderson*, 31 O. S. 162, *Wilmet v. Lyon*, 49 O. S. 296.

vent purchaser without reasonable expectation of ability to pay may be presumed to intend not to pay.

Applying these principles of law to this case, gentlemen, at the time the said W. gave the order for the purchase of goods from plaintiffs, did he in fact intend to pay for them, or from his financial condition had he a reasonable expectation of his ability to pay for said goods when the bills therefor became due and payable? If you find that the said W. did not in fact intend to pay for the goods, or from his knowledge of his own financial condition he had no reasonable expectation to pay for them, then such purchase was fraudulent, and the title to the goods would not pass to the said W. as between him and the plaintiff. But if you find that he did expect to pay for the goods, and from the knowledge of his financial condition he did in fact have reasonable expectation that he could pay for them when the bills therefor became due and payable, then he would not be guilty of fraud, and the title would pass.

In determining the question as to whether or not the said W. had a reasonable expectation of his ability to pay for the goods when they became due and payable, it would be proper for you to consider whether a man of ordinary business ability, situated as he was, could have reasonably expected to meet the obligations as they became due. It would be proper for you to consider whether the said W. on and after —, 18—, at the time of ordering and receiving said goods, honestly believed and expected, and from his financial condition had reasonable grounds for believing that he could pay for the bills as they became due and payable. The said W. was permitted to testify as to what his intentions were when he gave the order. This evidence was permitted to be given to you for your consideration in determining what his real intentions were, but it is not conclusive; you should consider it in connection with all the other evidence, and from it all say whether the said W. at the time he gave the order intended to pay for the goods, or had a reasonable expectation of being able to pay for them.²

² Nye, J., in *Childs, Groof & Co. v. Harvey Musser*, *Summit Co. Com. Pl.*

No. 215. Effect of mortgage given upon goods fraudulently bought.—Where a person fraudulently purchases goods and executes and delivers to a third person a chattel mortgage upon the property which he so acquires, the sole and only consideration of which mortgage is a debt then existing, and that no new consideration was paid at the time of the execution of said mortgage, such pre-existing debt is not such con-

sideration as would constitute such mortgagee a *bona fide* purchaser of said goods. If the only consideration for the making of such mortgage was a pre-existing debt, then such mortgagee would acquire no greater title and right in the property so procured by fraud than would a fraudulent purchaser.

Modeled from charge given by Nye, J., in *Childs, Groof & Co. v. Musser*.

No. 216. Chattel mortgagee may prosecute action for replevin—When mortgage attacked as fraudulent.—You are instructed that as matter of law "where a mortgagor of personal property by the terms of the mortgage retains the possession of the property until the condition is broken, but with the express stipulation that if the mortgagor should commit any waste or nuisance, or attempts to secret or remove the property, the mortgagee should be authorized to take immediate possession thereof; and before the condition broken, executions were levied upon the property at the suit of other creditors of the mortgagor under which said officer was about to remove said property from the possession of the mortgagor and sell the same to pay said executions, the mortgagee might obtain replevin for the recovery of said personal property."¹ Applying these principles to this case, if you find that the plaintiff loaned to the said B. the sum of \$——, and to secure the payment thereof the said B. executed and delivered to the plaintiff in good faith a chattel mortgage on the said property in order to secure said money, and that the said mortgage had been filed and refiled in accordance with the law, so as to create said mortgage a valid lien upon said property at the time of the commencement of this action; and you further find by the terms of said mortgage that said B. retained the possession of the property until condition broken, or until the debt became due, but with an express stipulation that if the said mortgagor committed any waste or any nuisance, or attempted to secrete or remove the property, the mortgagee, B., should be authorized to take immediate possession thereof; and before the said debt became due the defendant, E., as sheriff of said county, levied executions upon the said property at the suit of other creditors of the said B., under which the said defendant was about to remove said property from the possession of said B., and proceed to sell the same and pay said executions, the said plaintiff, B., would have the right to maintain replevin for the recovery of said personal property.²

¹ *Ashley v. Wright*, 19 O. S. 291.

² *Nye, J., in Beebe v. Ensign*, *Lorain Co. Com. Pleas*.

No. 217. Transfer of property by one in debt.—You are instructed that if a person who is in debt transfers his property to another, without consideration, or good and valuable consideration, without retaining sufficient property to pay his debts, such transfer would be fraudulent as against the creditors of the person so transferring said property. But you are instructed that when a person is in debt and his property is encumbered by mortgages or other liens, he has the right to borrow money and give security on any or all of his property to secure the payment of the money so borrowed, providing such transaction is a *bona fide* transaction and done in good faith.

Nye, J., in *Beebe v. Ensign*, Lorain Co. Com. Pleas.

No. 218. Damages for false representations in sale of horses—Injuries resulting therefrom—Knowledge and assumption of risks.—(The action from which the following instructions are taken was for the recovery of damages resulting from fraudulent representations claimed to have been made by the defendant to induce the plaintiff to buy a pair of carriage horses, in which it is claimed and alleged that the horses were vicious and unmanageable, and dangerous to drive; that they ran away while plaintiff was driving them in a reasonable manner, breaking the carriage and harness, and throwing the plaintiff out and injuring him so that he lost his leg. The case is founded upon false representations, and yet there are questions of negligence, or rather of contributory negligence, on part of plaintiff involved in it.)

“It must appear by a preponderance of the evidence that the alleged injuries of the plaintiff were caused by the wrongful acts of the defendant set out in the petition, whereby the plaintiff sustained his injuries, before you can say that he ought to recover. If you find that the plaintiff’s case is not made out by such preponderance of the evidence, you need go no further, but find a verdict for the defendant; or if you are satisfied from the preponderance of the evidence that the injuries to the plaintiff complained of would not have occurred but for the negligence or mismanagement of the plaintiff at the time the injuries occurred, or if you find from such preponderance of the evidence that he had knowledge of the vicious and ungovernable character of the horses, and, notwithstanding that knowledge, negligently and unreasonably exposed himself to the hazards by which he was injured, by driving them when he ought to have known that it was dangerous and imprudent to do so, then he would be treated in law as having taken upon himself risks arising therefrom,

and can not recover for the alleged injuries to his person, vehicle, or harness. For the law requires of the complaining party that he should act with reasonable care and prudence under the circumstances in regard to hazards known to him, or that reasonably ought to be known to him, and if he acts otherwise voluntarily, he can not charge the consequences of his folly to another. The rule of law is that when one voluntarily encounters a known hazard, he takes upon himself the risks resulting therefrom. So, we say to you, if but for his folly, the injuries complained of would not have happened, he can not recover. It is a rule of law as well as a sound conclusion of common sense and justice, that a person can not hold another for the consequences of his own folly.

Perhaps the rule would be better stated as follows: The plaintiff can not recover any compensation for any damages which he might reasonably have avoided by the use of ordinary care and prudence under the circumstances. So, if he voluntarily exposed himself to hazards he ought not to have encountered under the circumstances, which were known to him, and he thereby received injuries, he can not recover therefor.

So, if his injuries were the result of mere accident, he can not recover therefor. But in the absence of knowledge to the contrary, if the plaintiff acted in good faith, he would be entitled to believe that the defendant made truthful representations to him respecting the horses so sold to him, and in using them in a reasonable and prudent manner he would not be exposed to the hazards of using vicious and ungovernable horses.”

Voris, J., in *Sampsell v. Thurman*, Lorain Co. Com. Pleas.

No. 219. Same continued — Vendor's knowledge of defects—Duty to give notice.—It is a general rule that whenever a vendor has, or reasonably ought to have had notice of the defects in the horses calculated to do serious harm, of which the vendee has no notice, and neglects to notify the vendee, he becomes liable to him for damages produced by such neglect.

The fact that the plaintiff gave no notice to the defendant, of the first runaway, if you so find the fact to be, or of any other fact, on the same coming to his knowledge, if any, respecting the alleged vicious and ungovernable character of the horses, may be considered by you in determining whether he in good faith relied upon the representations of the defendant (after the first runaway) or took upon himself voluntarily the risks of continuing to drive them afterwards.

But the court says to you that the failure to give such notice of itself does not deprive the plaintiff of the right to recover.

“If you should find from the preponderance of the evidence that the defendants made the representations set out in the petition to induce the plaintiff to purchase the horses, that, by reason thereof and relying upon them, the plaintiff, not knowing anything to the contrary, purchased the horses, and you further find that the horses were unsound and vicious, restive, ungovernable, or worthless in harness when purchased, and that the plaintiff sustained damages thereby, then you should find for the plaintiff, though you should find that the defendant did not know the vicious character of the horses and did not intend to deceive and defraud the plaintiff.”

Voris, J., in *Sampsell v. Thurman*, Lorain Co. Com. Pleas.

No. 220. Same continued—Measure of damages.—The plaintiff can not recover for defects in the horses other than those alleged in the petition. But it will be sufficient if you find that some of them existed which constituted a breach of the contract and caused the injuries complained of. In which case, and should you further find that the defendants did not know the vicious character of the horses, and did not intend to deceive the plaintiff, but acted in good faith in making the representations, then the measure of damages would be the difference between the actual value of the horses when sold and what the value would have been had they been as represented to be by the defendant, to which difference you may add interest from the day of the sale to the first day of this term, the sum of which difference and interest will constitute the amount of your verdict.

But if you should find that the defendants made said representations not in good faith, but with intent to deceive and defraud the plaintiff, you may add to said sum so as aforesaid found such further sum as, in your judgment, guided by the evidence and these instructions, as will compensate the plaintiff for the injuries caused by the wrongful acts of the defendants as herein defined and limited. This may include compensation for impaired health, mental anguish, physical suffering, expenses incurred for surgical attendance and nursing, bodily injury, loss of time, considering either constant or probable duration, its effect upon his health and physical powers, his incapacity for labor, the pursuit of his profession, or other business, as you find the facts to be, upon the evidence.

As a guide, you are instructed that the legal damages that

follow the wrongs complained of are only such as according to common experience and the usual course of events might be reasonably anticipated (23 Ohio St. 632). If in such injury to his property that you may find from the evidence was caused or sustained by reason of want of exercise of reasonable care or prudence on the part of the plaintiff, and which he would have avoided had he conducted himself with reasonable care and prudence, he can not recover.

Voris, J., in *Sampsell v. Thurman*, Lorain Co. Com. Pleas.

No. 221. Fraudulent representations by vendor—Fraud not presumed—Nature of, to be actionable.—Whether in this case the defendants made the representations alleged, and whether they were false, and, if they did make them, whether they were made for the fraudulent purpose alleged, are questions exclusively for your determination from the evidence submitted to you; and in determining these, you are admonished that fraud is not to be presumed by you, except as established by the evidence.

Material representations made by a vendor of matters assumed by him to be within his personal knowledge are false and fraudulent in a legal sense if made with the intent to deceive the purchaser, if they are untrue and are relied upon by the vendee in making the purchase, and he is damaged thereby, although the seller did not know them to be untrue; or if he recklessly makes a false representation of truth of a matter of which he knows nothing, for the fraudulent purpose of inducing the purchaser to enter into a contract, and the purchaser enters into it relying upon the same, the vendor is as much liable as if he knew the statement to be false at the time he made it.

Voris, J., in *Sampsell v. Thurman*, Lorain Co. Com. Pleas.

No. 222. Fraud in sale of land—Preventing examination of the land.—“If the jury believe from the evidence in the cause that plaintiff, at or before the sale of the land in question to the defendant, knowing said land to be subject to overflow, used any artifice to mislead the mind of the defendant and throw him off his guard, and to prevent him from making as careful examination of the land in question as a man of ordinary prudence would otherwise have made; and that defendant was thereby misled and thrown off his guard, and prevented from examining said land, and in consequence thereof, was and remained ignorant of the fact that said land was subject to overflow up to the time when he bought said land, then, and in that case, the jury should find

for the defendant and assess his damages according to the measure heretofore stated by the court."

From *McFarland v. Carver*, 34 Mo. 195, 196.

No. 223. Fraudulent representations as to location, etc., of city lot.—"If you believe from the evidence that, at the time plaintiff purchased said lot, said defendant knew that it was intended as a residence lot; and if you further believe that he then and there told said defendant where and on what part of said lot he wished to build his house, and what the style of such house should be, and in what direction it should front; and if you believe that said defendant then and there, as an inducement to plaintiff to purchase said lot for a residence, represented to him that there was a street on the east and on the north side of him; and if you believe that by said representations plaintiff was induced to purchase said lot for the sum of \$400 for the purpose aforesaid, and that such purposes were known to the defendant; if you believe that plaintiff then and there made said purchase, and proceeded to build and did build a residence in the northeast corner of said lot, fronting east and north, and that such design was communicated to the defendant at and before said sale; and you further believe that said representations of defendant, made about a street on the north were false, and known to the defendant at the time they were made to be false; and if you believe that plaintiff has been damaged thereby, then you will allow him for the same."

From *White v. Smith*, 54 Ia. 233, 236, 237.

No. 224. Whether son has fraudulently persuaded parent to make beneficial dispositions of property to him.—This defendant had a right to importune and persuade the father to make such disposition as would be most beneficial to him, but in such importunity and persuasion, he must be careful not to make use of any unfair means, must make no false representations of the facts to the father, nor perpetrate any other kind of fraud to induce him to make such disposition in his favor. If the father did dispose of his property upon mere incessant importunity and persuasion, unmingled with fraud, in a manner that might benefit the defendant, as the result of such incessant persuasion, the transaction wouldn't be fraudulent on that account, couldn't be impeached for fraud. If in the use of such importunity and persuasion, he resorts to unfair means, or false representations of the facts, or other fraudulent means, he can not be permitted to enjoy the fruits of his wrong-doing or the advantage obtained by

such means. In your search for the truth in the case you must weigh all the evidence before you.

John D. Nicholas, Judge, in *Albright v. Thompson*, 27 W. L. B. 247. Judgment affirmed.

No. 225. Representations as to value of stock—Nature of such statement to be actionable—Mere opinions—When made.—It must be shown by a preponderance of evidence that there was some actual assertion made by the defendants that the stock of goods was of a certain value, and that the plaintiff relied upon the same, and that the statements were untrue, and that plaintiff was thereby misled to his injury.

Now, the statement or assertion that is relied upon must be positive; not a mere assertion or opinion, but must be intended to have the effect of influencing the mind of the other party.

(a) Mere opinions.

It must not be a mere expression of opinion on the matter, or guesswork, and not intended to influence the mind of the other party, but it must be a positive statement that does have influence on the mind of the party to whom it is made.

Representation of mere opinion not actionable. 5 *Lawson's R. & R.*, Sec. 2345; *Drake v. Latham*, 50 Ill., 270; *Jaggard on Torts*, 577; *Cooley on Torts*, 565.

There is no particular form of words necessary; no particular expression is necessary to make such a statement as I have referred to, but any distinct assertion of the value of this stock, or any direct assertion to lead the plaintiff to believe it was of such value will be sufficient; and the statement, as I have said, must have been made so as to have induced the plaintiff to purchase; and, if that is so, and thereby the plaintiff was induced to purchase, it is immaterial at what stage of the negotiations it was made, if previous to the conclusion of the contract between the parties. If representations of value were not made until after the sale was consummated, of course it would not have been an inducement, and can not be considered in the case. It must have been made before the sale was consummated fully. It is necessary also for the plaintiff to show that he relied on this statement of the defendant in the case; for, if he made the purchase not relying on these representations, but relying upon his own judgment, or that of outside parties, then he can not be said to have been misled by the defendants' misrepresentations.

If you find from the evidence that the defendants simply priced their stock at \$4,500, without misrepresentation of the same, and its value, you will be justi-

fied in finding for the defendants, because a man has the right to sell his property for all he can get for it, providing he makes no false representations. He has the right to remain silent in such cases. But there are cases in which silence is as much falsehood as speech, but I need not undertake to define them to you. But where a party has the right to remain silent and does not mislead the other party, and allows the one with whom he is trading to act on his own judgment, he is not bound to lay before the other party all the facts about the matter, and advise him about all the minute details, but he is bound not to deceive him.

Calvin D. Wright, Judge, in *Randolph v. Ammon*, 51 O. S. 585. The case was reversed by the Circuit Court by sustaining a demurer to the petition, and this was modified by the Supreme Court, and sent back for new trial, and that rule would not affect the charge.

No. 226. Proof of fraud.—You are instructed that fraud is never presumed, but is to be proved like other facts, and the degree of evidence is like that prevailing in ordinary civil actions, and need not be proved beyond a reasonable doubt¹, but only by a preponderance of the evidence.² It may be established by direct and positive evidence, and may also be proved by circumstantial evidence as well as positive proof;³ circumstances may be proven by competent evidence from which the inference of fraud which is alleged will naturally arise, and the jury will be justified in considering the fraud as proven by such inferences. The act or commission of fraud is so much different from the ordinary run of facts, that it is more difficult of proof; it is about as difficult sometimes to prove fraud as it would be to prove a criminal act, because the guilty party so frequently covers up and conceals his acts. If the circumstances which are proved by a preponderance or greater weight of evidence are such as to convince the jury that the fraud charged has been committed, they may so find.⁴

¹ *Eames v. Morgan*, 37 Ill. 260-2; *Strader v. Mullane*, 17 O. S. 624.

² *Id.*

³ *Strauss v. Kranert*, 56 Ill. 254.

⁴ *Jones v. Greaves*, 26 O. S. 2; *Lake v. Doud*, 10 O. 415; *Wilson v. Delarask*, 3 O. 290; *Cooley on Torts*, 475 (2 ed. p. 556). "Fraud is properly made out by marshaling the circumstances surrounding the transaction, and deducting therefrom the fraudulent purpose, when it manifestly appears, as by presenting the more positive and direct testimony of actual purpose to deceive; and indeed circumstantial proof in most cases can alone bring the fraud to light, for fraud is peculiarly a wrong of secrecy and 'circumvention, and is to be traced not in the open proclamation of the wrongdoer's purpose, but by the indications of covered tracks and studious concealments." (*Id.*) It need not be shown "conclusively." *Sparks v. Dawson*, 47 Tex. 138. "The proof need not be positive, but must from the nature of things be circumstantial." *Whittaker's Code of Ev.* 417, 502. The Court in *Pritchard v. Hopkins*, 52 Iowa, 120, charged that—"The defendant must establish the existence of fraud by a preponderance of the testimony before you can find for the defendant."

GAMBLING CONTRACTS.

No. 227. Contracts for sale of grain to be delivered at future day.—Where transactions on their face are purchases and sales of commodities by one party of and to another, the burden of proof rests upon him who asserts their illegality, on the ground that they are gambling transactions, to prove by a preponderance of the testimony that they are in fact gambling transactions; and to establish this, the facts and circumstances must be so convincing and strong that no other reasonable conclusion can be drawn from them.

Contracts are not presumed to be illegal; on the other hand, they are presumed to be legal until the contrary clearly appears. A contract for the sale of grain or other commodity, to be delivered at a future day, is not invalidated by the fact that it was to be delivered at a future day, or by the additional fact that at the time of the making of the contract the vendor had not the goods in his possession, or by the additional fact that at the time he had not entered into any contract to buy or procure the goods, nor by the further fact that at the time he had no reasonable prospect of procuring them for delivery, according to the tenor of the contract. In such case, if either party to the contract has the right to compel a delivery or receipt of the goods, it is a valid contract, although the parties thereto thereafter settle and agree to close up the transaction by a payment of differences. Nor does the statute of Ohio apply to sales of grain or other goods for future delivery, where the only option is as to the time of delivery, within certain limits. The intent of that act is to prohibit transactions which are purely options to buy or sell, where there is no intention, but the contrary, upon the part of the parties ever to deliver or receive and pay for the goods. It should appear, however, in order to uphold a contract for the sale and delivery of grain at a future day or time for a price stated, that it was the purpose of the parties that there should, in fact, be a delivery and receipt of the grain. If made with a *bona fide* intention to deliver the grain and to receive and pay for the same, it is valid in law.

(a) Intention of the parties governs.

It is the intention of the parties at the time the contract is entered into that gives character to the same. In other words, it is the key to the real transaction by which it should be

tested. What was the intention of the parties to this contract at the time it was made in respect to an actual delivery and receipt of the goods contracted for? An understanding between the vendor and vendee, at the time the contract is made, that the goods shall not be delivered or received, but merely to pay and receive the difference between the price agreed upon and the market price at the time named for its delivery, brings the transaction within the statute, and it is void. Nor does it matter what form the parties gave to their contracts. They may be painstaking and legally exact in this respect. On its face the contract may be, in all particulars, legitimate and regular. As the Supreme Court of the United States declared in the case of *Irvine v. Willard*, "Gambling is none the less such because it is carried on in the form or guise of legitimate trade." And, in the language of another high authority, I charge you that however formal and correct a contract may be on its face, yet if this formality is resorted to as a mere disguise, and the real understanding and agreement between the parties thereto at the time it was entered into was that it should not be performed according to its tenor, and both the parties do not intend an actual delivery of the article bargained for, but merely to settle the differences between the price agreed to be paid for the article and the market price at the time fixed in the contract for its delivery, it is a gambling transaction within the meaning and intent of our statute, and is also against public policy and wholly void.

The secret intention of one of the parties to a contract that the grain shall not be delivered and received, but that settlement shall be made as already stated, is not sufficient to render the contract invalid; it must be the mutual understanding and agreement of both the parties thereto. In short, I state it this way: If the intent and purpose of both the parties to the contract is purely and nothing else but to wager on the rise or fall of the price of grain, and no delivery or receipt of the same is to be had, and not to deal in it *bona fide*, the transaction is a gambling affair, and is utterly void.

From *Lester v. Buell*, 49 O. S. 240.

No. 228. Fact that one party acts as commission merchant does not change relation.—If you find that, in pursuance of directions from the defendants, or from their agent authorized in the premises, the plaintiff did, in his own name, make *bona fide* sales and purchases for future delivery for defendants, by which the parties to whom the plaintiff made such sales, or from whom he made such purchases, had a right to compel delivery of the grain bought and sold, or

enforce a payment of damages for breach of contract, such transaction is not illegal as between plaintiff and defendants, although defendants never intended to deliver or receive the grain sold or bought, and although the plaintiff knew at the time of such intention. If, under the proof, you find the transactions valid as between the defendants and their vendors or vendees, such transactions are valid as between defendants and their broker, commission merchant, or agent. And if you find in this case that plaintiff acted merely as defendant's agent, whether he assumes to make the purchase or sale as a commission merchant only, will not alter the relation of the parties, and whatever the transactions were, whether they were valid or not, plaintiff can not recover for his commission, and for the money advanced by him for the defendants under such circumstances that an agreement to repay will be implied.

If you find the transactions illegal and void, under the instructions which have been given you, and you further find that the plaintiff acted as agent in these transactions, and knew or had reason to know all about the illegal character of the same, and knowingly assisted the defendants in the advance of the money, and was acting in such agency to bring about the gambling transactions in which he advanced the money, and sought thereby to keep up and aid such transactions, and advised and procured the same to be done by himself or by Mr. C., and so acted in the premises as to be affected by the immoralities of the transaction, he can not recover. If he advised, aided and procured gambling transactions to be entered into by the defendants in these alleged grain deals, and was acting by himself or agents in carrying them on, and did it on purpose to gamble in grain in this way, and obtained from the defendants their money in illegal and gambling affairs, he is a principal in the commission of all the offenses.

Lester v. Buell, 49 O. S. 240, and cases cited.

GRAND JURY.

No. 229. Grand jury—General charge to.—Gentlemen of the grand jury: Under the constitution of the state of Ohio no person can be put upon trial for any capital or other infamous crime or felony until he has first been indicted by a grand jury of the county in which the crime was committed.

A grand jury is composed of not less than fifteen good and lawful men summoned from the county. An indictment is a written accusation of crime against one or more persons presented to and preferred by the grand jury upon their oath or affirmation.

Before you enter upon the discharge of your duties, it is incumbent upon the court to instruct you concerning them,¹ and it is your duty to obey the instructions so given. An outline, an abstract, of your duties is contained in the oath which your foreman took and the rest of you took by adoption. You were sworn to diligence, secrecy, and impartiality; or, as has been summarized by another, your duty is to "inquire with zeal, hear with attention, deliberate with coolness, judge with impartiality, and decide with fortitude."

(a) Character of evidence to warrant indictment.

It is not your province to determine in any case whether a person who may be accused of having committed a crime is really guilty. It is to determine whether there is sufficient evidence to put him on trial before a petit jury. Before you can find a bill, you ought to be satisfied that the evidence before you unexplained and uncontradicted would be sufficient to authorize a petit jury to convict the accused of the crime which is imputed to him. If the evidence only establishes a probability of guilt, that is not sufficient; but in determining this question, you have no right to assume that there will be evidence upon the trial of the case before a petit jury that would explain or contradict the evidence which has been offered by the state before you. You are to decide the question solely upon the evidence that is before you; and if it satisfies you that it is sufficient to warrant a petit jury in convicting, it is your duty to indict, otherwise not. The rule requiring sufficient evidence to convince beyond a reasonable doubt does not apply to the deliberations and conclusions of a grand jury.

¹ R. S., Sec. 7193, requires that the judge call attention particularly to the obligation of secrecy, and explain the law applicable to such matters as are likely to be brought before them.

(b) *Legal evidence only to be considered.*

It is your duty not to listen to any testimony except that which is legal; that excludes hearsay, reports, rumors, or conjectures, but it is competent for you to consider any legal evidence which comes before you properly, whether it tends to excuse or exculpate the persons who may be under charge.

(c) *Looking at guilt and innocence.*

Your duty even goes farther than this. While the design of the law is that the grand jury's investigation shall be one-sided, still, if in the pursuit of truth it is developed that there is evidence within reach of the grand jury that may explain away or qualify the charge under consideration, it is competent for you to send for that testimony. It is not right that any person should be indicted for an isolated fragment of any transaction, as has been well said. No innocent person should be indicted if there is evidence within reach of the grand jury that would qualify or explain away suspicious circumstances against him. But this does not mean—and this statement I am about to make is consistent with the one I have just made—it does not mean that you are to send out and search for testimony that would exculpate the persons who may be under charge. You are not a petit jury, and you have no right to supersede the trial jury by hearing both sides of a case. The evidence which you may send for to explain away or qualify the evidence for the state offered before you means simply that kind of testimony. It does not mean that you can send for evidence which would contradict the evidence offered for the state, and thus compel you to locate the preponderance of evidence, or to determine which of the witnesses whose testimony conflicts are telling the truth.

(d) *Scope of inquiry.*

The oath which you took, gentlemen of the jury, makes it your duty to "diligently inquire and true presentment make of all such matters and things as shall be given you in charge, or may come to your knowledge touching the present service."² That language is a little bit obscure and it needs annotation. Obviously it means any matter which may be given you in charge by the court, or which may be submitted to your consideration by the prosecuting attorney. It includes those cases in which persons have either been recognized or committed to jail to await an indictment, a list of which will be handed to your foreman.

² R. S., Sec. 7191.—This oath means that they are to inquire into the circumstances of the charge, the credibility of the witnesses; not to judge of the merits, but satisfy their minds that there is probable cause for the accusation. 1 Wharton's Cr. Law, § 100.

This designation of the scope and subjects of your inquiry also means that it is your duty to inquire into crimes of which the knowledge may come to you from three other sources. While you are investigating the matters that may be submitted to your consideration by the court, or by the prosecuting attorney, or which may come before you on this list that I mention, a witness testifying may reveal facts showing that another crime has been committed; he may commit perjury in testifying. You may yourselves have witnessed the commission of some crime. From the disclosures made by your fellow jurors in the jury-room you may learn that other crimes have been committed. It is your duty to inquire into all these matters, for they come within the purview of that paragraph or portion of the oath which I have just quoted.³

(e) *Secrecy must be observed.*

Your oath makes it your imperative duty, gentlemen of the jury, to keep rigidly in confidence the counsel of the prosecuting attorney, his assistants, your fellow jurors, and yourselves, until compelled in a court of justice to reveal it. There is no obscurity in that language, and in that portion of your oath. It means that you are not at liberty to communicate to any person what has been done in the grand-jury room; it means that you are not at liberty to tell any person what has been done or said in the grand-jury room, either by the prosecuting attorney, or by his assistants, or by your fellow jurors, or by yourselves. It means that you must have courage enough to refuse to permit anyone to question you about the proceedings in the grand-jury room, or to suggest or ask you to vote for or against the indictment of anyone.

³ The grand jury shall proceed to inquire of and present all offenses whatever committed within the limits of the county. R.S., Sec. 7194. This seems to be the only statute in Ohio in any manner designating the scope of inquiry to be made. The extent of the powers of the grand jury is not well defined by statute or by the authority of precedent. Different courts have arrived at variant conclusions. Taking the oath administered and the provision of the statute referred to and it surely authorizes the jury to investigate for themselves. That grand juries may, on their own motion, institute any prosecution, see Opinion of Attorney General, 22; Wilson's Lectures, 361; U. S. v. Tompkins, 2 Cranch C. C. 46; Prof Wharton's 5th Ed. Crim. Law, page 457, gives the opinion of Judge Catron, of the U. S. Circuit Court, in which he maintained that: "The grand jury have the undoubted right to send for witnesses and have them sworn to give evidence *generally*." In Ward v. State, 2 Mo. 120, the court held that the grand jury could call and request witnesses to testify *generally*. To same effect see State v. Wallcott, 21 Conn. 272. Our statute makes it the duty of the clerk, "when required by the grand jury," to issue subpoenas, which further indicates that our state is committed to the power of the grand jury themselves to institute matters.

In Lewis v. Wake, 74 N. C. 194, the inquisitorial power of the grand jury to invade the family privacy of the county was denied.

As a rule, legal proceedings do not avoid, but rather seek daylight. The proceedings of the grand jury are an exception. Accusing a person of a crime which may blast his reputation and cover him with ignominy is a grave matter, and should not be done except for sufficient reasons and for the most momentous cause. It has been the policy of the common law ever since the Great Charter to protect guiltless persons from accusation. One of the objects of the institution of the grand jury was to first have privately examined accusations of crime and ascertain whether there is a probability of their truth before giving them publicity in the form of an indictment.

Again, it is true that in every community there is a class of persons who are eager to start criminal prosecutions upon inadequate evidence. Sometimes this is done from honest motives; sometimes from base, malicious, and corrupt motives. If the grand jury were not required to keep secret their deliberations, what occurs in the grand-jury room, you can readily see that, at every term of court, there might be a large crop of unjustly damaged reputations.

Again, when a criminal prosecution is started before the grand jury, this obligation of secrecy should be observed to prevent the accused from escaping justice, from escaping condign punishment. If they could learn, by the grand jury not keeping the secrets of the grand-jury room, that they are to be indicted, opportunities would be afforded for their escape. It is the usual mode of beginning prosecutions for an arrest to be made upon a warrant issued by a magistrate, and a preliminary examination to be had before the magistrate, where the accused can meet his accuser and have counsel to defend him and examine his witnesses; but the grand jury is not limited by law in its investigations to cases thus initiated. A criminal prosecution may have its genesis, its beginning, before the grand jury. I mention that because I want to further illustrate that statement I have made that it is necessary to observe this part of your oath in order to prevent that class of criminals from escaping punishment.

Again, if this obligation of secrecy was not enjoined by law, and grand jurors did not keep it, there would be another way in which justice might be defeated. It would enable the friends of those who were accused before the grand jury to bring to bear all possible influences to prevent the indictment.

It is therefore obvious, gentlemen of the jury, upon these considerations, that this duty of secrecy, although foreign to the law and its proceedings generally, is absolutely necessary in the investigations of the grand jury, for the protection of

the innocent and the punishment of the guilty. It is not an idle obligation that you take to keep these matters secret. It is not a meaningless obligation; it is just as obligatory upon each grand juror as is the oath of a witness, to tell the truth, the whole truth, and nothing but the truth.⁴

(f) *Malice and improper influences.*

That part of your oath which forbids you to present anyone through malice, hatred, or ill will, but at the same time enjoins you not to leave unrepresented any person from fear, affection, or reward, or hope thereof, and also in all of your presentments to present the truth, the whole truth, and nothing but the truth, to the best of your skill and understanding, demonstrates that in your conclusions you must be guided by an impartial spirit.⁵

(g) *Influence by religious or political connections.*

When you enter the grand-jury room, there are certain feelings and prejudices from which you ought to divorce yourselves. No grand juror has the right to permit his understanding or judgment to be influenced or controlled by any religious or political bias or personal feeling. No grand juror has a right to start a criminal prosecution to aid or defeat either side of a political, religious, or personal controversy. No man should be indicted to gratify any other person's malice. Whenever such reprehensible conduct is done by grand jurors, or by a grand jury, it degrades the high character of the grand jury.

(h) *Relations of prosecuting attorney to grand jury.*

The prosecuting attorney and his assistants are constituted by law the representatives of the state in all criminal prosecutions. It is their privilege and their duty to be present with the grand jury in its room, to present the accusations, "to give information with relation to any matter that may be cognizable by the jury, to give advice touching any matter of law when required, and to examine the witnesses when they deem it necessary." It is their duty to instruct you touching legal matters with the utmost fairness and candor, remembering that they are in charge of a tribunal before whom only one side of a case can be fully heard. It is your duty to follow their instructions on matters of law, unless you are instructed to the contrary by the court; but all questions of fact you must determine solely upon the evidence. Neither the prosecuting attorney nor his assistants have the right to

⁴ Grand juror must not disclose that an indictment has been found against any person not in custody. R. S., Sec. 7204. He can not state in court how he voted on any question. R. S., Sec. 7205.

⁵ R. S., Sec. 7191.

advise you, to suggest to you, or to hint, or intimate how you shall decide the questions of fact.

(i) *Clerk may be required to issue subpoenas.*

You, as well as the prosecuting attorney, have the right to require the clerk of court to issue subpoenas for witnesses to be brought before you to testify. You are at liberty at any time to call for further instructions from the court, although the instructions which the prosecutor and his assistants give you will probably be sufficient for all purposes.

David F. Pugh, Judge, Franklin Co.

HOMICIDE.

No. 230. Appropriate remarks as to gravity of charge and duty of jury in homicide cases.—This is a case of the first importance not only to the defendant, but also to the state, and the duty with which you are charged is one of the most solemn and sacred that can devolve upon a citizen in any relation of life. It is essential to the peace and welfare of society and good government that every guilty man be punished, when his guilt is established by a measure of proof required to convict of crime in a court of justice. You will readily appreciate its importance to the defendant, because it involves his liberty and his life. You should bring to the consideration of this case your most careful consideration and deliberate judgment. You should not allow your minds to be influenced by considerations of sympathy for the deceased, or for his family or friends, or for the defendant, or for his family or friends.

You will have discharged your duty to the state and to the defendant, if, when your verdict is made up, after a careful consideration of the law and the evidence, you can truthfully say that you have conscientiously discharged your obligations to make it a true deliberation between the state and the defendant.

The great gravity of the charge and the extreme caution with which you have been selected admonish you that your verdict should be approached with great care, and when reached, should be the result of your soundest and best judgment upon the whole case.

The law requires that you should remain in a body until you agree upon a verdict, or until you are otherwise discharged

by the court. During all your deliberations you must be most careful to permit no one to know the state of the same, and to permit no one to approach or converse with you concerning anything that is transpiring in the jury-room.

William R. Day, J., in *State v. Webster*.

No. 231. First degree murder.—A complete charge—Some preliminaries.—This indictment by its terms charges said defendant under the statutes of this state with murder in the first degree. The defendant having plead to this indictment says that he is not guilty as charged therein, and you are now called upon to ascertain and determine whether or not the charge so made against this defendant under the indictment is true.

(a) *Plea of not guilty.*

The plea of not guilty so made puts in issue and denies each and every averment in the indictment, and it, therefore, devolves upon the state to satisfy you and each of you beyond the existence of a reasonable doubt of the truth of each of the averments in said indictment essential to constitute the crime charged against the defendant before a verdict of guilty can be rendered against him, and, unless you and each of you are so satisfied, it is your duty to acquit the defendant.

(b) *Presumption of innocence.*

The indictment creates no presumption of guilt against the defendant. The law presumes this defendant to be innocent, and this presumption carries with it all that a presumption of innocence implies, and these presumptions as well as the presumption of innocence follow and remain with him throughout, and must be recognized by you in your deliberations.

This presumption is not an idle one, but it is intended and should inure to the benefit of the defendant upon every material fact which you will be called upon to consider, and it must not only be overcome and overthrown, but the state must go further and satisfy you and each of you in the manner and to the extent already stated, that the defendant is guilty; and, until this is done, the defendant is entitled to your verdict. And in all doubtful cases this presumption is sufficient to turn the scale in favor of the defendant.

(c) *Evidence must exclude every reasonable doubt.*

Evidence must be such as to exclude every reasonable doubt of the guilt of the defendant of the crime charged against him, and all the facts proved must be consistent with his guilt and inconsistent with his innocence. And before

you will be authorized to render a verdict of guilty against the defendant in this case, you must find from the evidence adduced, and from the proof admitted upon the trial, that each and every fact necessary to be proven has been separately and independently established by proof that shall satisfy you with a degree of certainty which will exclude from your minds every other reasonable conclusion except that of the guilt of the defendant. And your judgment and conscience must be so satisfied that the crime charged was committed by the defendant, and so satisfied as to leave no other reasonable conclusion possible.

You will be justified and are required to consider a reasonable doubt as existing, if the material facts, or any one of them, without which guilt can not be established, may be fairly reconciled with the innocence of the defendant; and for all purposes of law a reasonable doubt of guilt is sufficient to command a verdict of acquittal as the clearest proof of innocence.

(d) Reasonable doubt.

By a reasonable doubt is meant an honest uncertainty that may exist in the mind of any one of you after hearing all the evidence in the case and carefully and impartially considering the same under the directions here given you; not a mere captious doubt, but a doubt for which a substantial reason could be given, and if, after you have calmly, dispassionately, and earnestly considered all the evidence submitted to you, you do not feel that certainty as to the guilt of the defendant which would move you to action in the most important concerns of your own life, you may and should consider a reasonable doubt of his guilt as existing, and should return a verdict of acquittal. Strong suspicions, or even strong probabilities of guilt, are not sufficient to convict. Neither is a preponderance of the evidence sufficient as in civil cases; but the proof must be such as to create a clear and undoubted conviction in your minds as to the guilt of the defendant.¹

(e) Essential elements to be proven.

Before a conviction can be had under this indictment there are certain essential elements of the crime which must be established by the state to your satisfaction, and satisfy you and each of you beyond the existence of a reasonable

¹ Not a captious or whimsical doubt. *Morgan v. State*, 48 O. S. 371; *Clark v. State*, 12 O. 483, 495. Nor an ingenious or artificial doubt. *Melitor v. State*, 20 W. L. B. 323, 6 C. C. 203. Each circumstance need not be proved beyond reasonable doubt. *Breck v. State*, 4 C. C. 16. Each juror must be satisfied beyond a reasonable doubt. *State v. Town*, W. 75; *McGuire v. State*, 4 C. C. 331.

doubt, as already stated. These essential elements of fact are: The crime must have been committed by the defendant, in the County of —, in State of —, on or about —, 18—; that W. H. H., named in the indictment, was at that time a living person in that county, that he is now dead, that he died in the County of —, in the State of —, on the — day of —, 18—; that he came to his death by reason of a mortal wound inflicted upon him by the defendant in the manner and form, with the intent and purpose, and by the means mentioned and described in the indictment. These are questions of fact to be determined by you from the evidence in the case, and if the state has failed to establish each and all of them to the satisfaction of each and all of you, to the extent and in the manner already indicated, the defendant could not and should not be convicted.

(f) *Charge of first degree murder—Also includes lesser degrees.*

This indictment by its terms charges the defendant, as already stated, with murder in the first degree; it also includes and embraces in its terms the crimes of murder in the second degree, manslaughter, assault and battery, and assault; and under it the defendant may be lawfully convicted of the crime of murder in the first degree, or any of the lesser crimes mentioned, if in your judgment the evidence before you, under the law here given, warrants such conviction, and upon the failure of the evidence under such rules as are here given you to establish his guilt as to any one of them, he must be acquitted. If the evidence so warrants it, you may find him guilty of murder in the first degree, or you may acquit him of murder in that degree and find him guilty of murder in the second degree, or you may acquit him entirely of murder and find him guilty of manslaughter, or you may acquit him of murder and manslaughter and find him guilty of assault and battery, or you may acquit him of all the foregoing and find him guilty of a simple assault, and should the evidence fail to satisfy your minds beyond a reasonable doubt and to the extent already stated of the guilt of the defendant of the crime of murder in either degree, or of manslaughter, or of assault and battery, or of assault only, you should acquit him and return a general verdict of not guilty.

(g) *Murder and manslaughter defined.*

Under the statutes of this state, murder in the first degree, so far as it is necessary for the purposes of this case, is defined as follows: Whoever purposely and with deliberate and premeditated malice kills another is guilty of murder in the first

degree,² and murder in the second degree for all the purposes of this prosecution is thus defined: Whoever purposely and maliciously, but without deliberation or premeditation, kills another is guilty of murder in the second degree.³ The only difference between them being the presence or absence of deliberation and premeditation. If these two elements are present, it is murder in the first degree; if either or both are present, it is murder in the second degree. *Manslaughter* may be thus defined: Whoever unlawfully kills another, except as defined in the two former definitions given, is guilty of manslaughter, or it is the unlawful killing of another without malice either express or implied, which may either be voluntary upon sudden quarrel, or unintentionally, but while the slayer is in the commission of some unlawful act. *Assault and battery* consists of any intentional violence by one upon the person of another; as the bare touching of the person of another in an angry, revengeful, rude, or insolent manner, and even greater violence might amount to no greater crime. An *assault* is defined to be any attempt by violence to do a personal injury to another, and this may be either with the hand or with a weapon, but it must not be more than an attempt, it must fall short of inflicting the intended injury or it would amount to something more than an assault.

(h) *What is essential to conviction in the first degree.*

Under this indictment it is essential to a conviction of murder in the first degree, and you and each of you should be satisfied beyond the existence of a reasonable doubt, and to the extent already stated, that the defendant, in the manner and in the form charged, and at the time and the place charged, did kill said W. H. unlawfully, feloniously, and purposely, and of deliberate and of premeditated malice. An act is done unlawfully when done in violation of law.

(i) *An act feloniously done explained.*

To do an act feloniously is to do it criminally. To do an act purposely means to do it intentionally, not accidentally or by mischance, and this is the sense in which this term is used in our statutes and in this indictment. It imports an act of the will, intention—a design to do an act. Ordinarily the purpose to kill is to be gathered or deduced from the circumstances under which the killing is done. The presence of intent or purpose is a question of fact to be determined by you from all the circumstances and facts proven in the case.⁴

² R. S., Sec. 6808.

³ R. S., Sec. 6811.

⁴ An intention must be present. 25 O. S. 464.

(j) *Inflicting mortal wound with deadly weapon—Inference from.*

If you find under the instructions here given, that the defendant inflicted a mortal wound upon W. H. with a deadly weapon, that the same was used in a manner purposely calculated to destroy life, you may infer the intent or purpose to kill from the use of such weapon.⁵

(k) *Person intends natural consequences of his act.*

It is a general principle and you may apply it to this case, that what a man does willfully he intended to do, and intended the natural and reasonable consequences of his voluntary and deliberate acts, unless the circumstances are such as to indicate the absence of such intent.⁶

(l) *Deliberations and premeditation.*

If you find the killing to have been done, and done unlawfully, purposely, and feloniously, before the defendant can be convicted of the crime of murder in the first degree, you must be satisfied as already stated, and find further that the same was done with deliberate and premeditated malice, and that would require you to find that the defendant had formed the purpose to kill in his mind; that, having so formed such purpose, the same was by him deliberated upon and premeditated before the act of killing was done. The law fixes no time during which such premeditation and deliberation shall take place. It is not necessary to be of any particular length of time, but you must be satisfied from the proof as already stated, and to the extent stated, that the defendant had formed a purpose to kill in his mind, had deliberated and reflected upon it, and it is sufficient although a short time had elapsed after such purpose was formed and the act of killing was done, if the same was deliberated and premeditated upon by the defendant. It must have been an act of deliberate and premeditated malice.⁷

(m) *Malice.*

The word "Malice" in its ordinary acceptation is apt to be associated with the passions of anger, hatred, or desire

⁵ Gardner v. State, W. 392; Erwin v. State, 29 O. S. 186. A deadly weapon is one which is dangerous to life when used in the manner in which it is capable of the most injurious results. U. S. v. Small, 2 Curtis 241.

⁶ Robbins v. State, 8 O. S. 131.

⁷ It is error to charge that deliberation and premeditation may be accomplished in a very short time—in a moment—so swift as thought. Burns v. State, 3 W. L. G. 323. The law fixes no time. Shoemaker v. State, 12 O. 43; 2 Wharton Cr. L. 948. While malice may be inferred from the act of killing, there is no presumption that it was done with deliberation or premeditation; this must be proved by affirmative evidence. State v. Turner, W. 20; State v. Town, W. 75; Bennett v. State, 10 C. C. 84. See Judge Birchard's charge in Clark case, 12 O. 495.

for revenge. In contemplation of law, malice may and frequently does exist without the presence of either of these passions or desires. In law, malice signifies a willful design to do another an unlawful injury, whether such design be prompted by hatred or revenge, or springs from the wantonness or depravity of the heart, disregarding all social and moral duties, and fatally bent on mischief. Therefore, if you and each of you are satisfied from all the evidence to the extent already stated that the defendant, on the — day of —, 1887, in the County of —, in this State, in the manner and form mentioned and described in the indictment, did unlawfully, feloniously, and purposely, and of deliberate and premeditated malice, kill said W. H., then he is guilty of murder in the first degree under this indictment, and you should so state by your verdict. If you or any of you have a reasonable doubt as to the existence of any one or all of these elements of murder in the first degree as charged in this indictment, having been established by the evidence in this case, it will be your duty to acquit the defendant of the crime of murder in the first degree as therein charged.

(n) If not found guilty of murder in the first degree, may be of second.

If you find the defendant is not guilty of murder in the first degree, you may then inquire further and ascertain and determine whether under this indictment he is guilty of murder in the second degree. As already stated, the essential elements of this crime are the same as those of murder in the first degree, except it is not necessary that the killing be done of deliberate and premeditated malice. Therefore, if you are satisfied beyond the existence of a reasonable doubt that the defendant, on the — day of —, 18—, in the County of —, and State aforesaid, in the manner and by the means mentioned and described in the indictment, did unlawfully, feloniously, and purposely kill W. H., but without deliberation or premeditation, or either of them, then he is guilty of murder in the second degree, and you should so report by your verdict. If, however, you have any reasonable doubt as to the essentials of any one or all of these elements of murder in the second degree having been established by the evidence in this case, it will be your duty to acquit the defendant of the crime of murder in the second degree under this indictment. In considering the evidence and determining whether or not the defendant is guilty of murder in the second degree, you should apply the same definition to the words

“purposely” and “maliciously,” and the terms “malice” and “purpose,” or any other terms therein used, as have already been given to you in connection with the instructions as to murder in the first degree.

The law presumes any felonious killing to be murder of some degree, but that presumption rises no higher than second degree, unless the state, by clear and satisfactory evidence, establishes the guilt of the defendant of the higher crime to the extent and in the manner already stated.⁸

(o) *May be found guilty of manslaughter, when.*

If you in your investigation of this case should find the defendant not guilty of murder in the first or second degree, you may inquire further and ascertain whether the defendant is guilty of unlawfully killing W. H., in the manner and by the means and at the time and place charged in the indictment, and if you should be satisfied to the extent and in the manner already stated that W. H. was killed by the defendant, then you should find the defendant guilty of manslaughter, and should return a verdict accordingly; but if you and each of you should not be so satisfied, then you should render a verdict of acquittal as to this offense. In manslaughter, as already stated, the unlawful killing may be without malice, either upon sudden quarrel or unintentionally whilst the slayer is in the commission of some unlawful act, and the same certainty of proof is required and the same degree of proof as indicated as being necessary in murder in the first and in the second degree before a verdict of guilty could be rendered against this defendant for manslaughter.⁹

(p) *May be guilty of assault and battery.*

If you should find the defendant not guilty of any of these crimes already mentioned, you may under this indictment, if the evidence in the case warrants it, find the defendant guilty of an assault and battery, or of an assault only. The essential elements of these offenses have already been given in the definitions of the same, and need not now be repeated. These offenses should be established by the same certainty of proof as already indicated as being necessary in each of the other crimes named, and, unless you are satisfied in the manner and to the extent already stated that the defendant is guilty of any one of the crimes or offenses named, it is your duty to acquit him, and the presumption of innocence already spoken of follows the prisoner and inures it to his benefit to the

⁸ The jury may determine the grade of the crime. *Adams v. State*, 29 O. S. 412. See *Dresback v. State*, 38 O. S. 365.

⁹ See *Adams v. State*, 29 O. S. 412. Under indictment for second degree may be convicted of manslaughter. *Wroe v. State*, 20 O. S. 460.

extent already stated as to all the crimes and offenses here named, and to each essential element necessary to constitute such crimes or offenses.

(q) *If the defendant was aiding and abetting.*

If you find, under the directions and instructions here given you, that W. H. was killed at the time and place, and in the manner and by the means mentioned in the indictment, it is not necessary for you to find that the blow that killed H. was struck by this defendant himself, if you find that the defendant was present, aiding and abetting the person who struck the blow, and was there acting in concert with such person with the intent and purpose of aiding him in the commission of the offense, and in pursuance of a common design and purpose previously formed. Ordinarily that person is regarded as the principal who performs the act complained of, and one who acts in concert with him with the intent and purpose to aid in the performance of the act and commission of the offense is an aider and abettor. The law, however, provides that: whoever aids or abets, or procures another to commit an offense may be prosecuted and punished as if he were the principal offender. And, in this case, I say to you as a matter of law that, if you find that a crime was committed as charged in this indictment, under the directions and instructions here given you, and you should find that this defendant with others had formed a joint design and purpose to commit the same, and at the time the same was committed this defendant was acting in concert with others in the commission thereof, and with the joint intent and purpose to commit the same, and that while one or the other of those thus acting in concert with the defendant did the manual act of committing the crime or offense of striking the blow upon the forehead of W. H., in pursuance of such common design and purpose, this defendant was present, aiding and abetting in the accomplishment of the common design and purpose, then he would be guilty of the crime or offense so committed, and may be convicted as principal, under this indictment, of any of the crimes and offenses therein charged. But you can not under this indictment find the defendant guilty by reason of any offense committed or any act done against H. H., and before you can find this defendant guilty, you must find that there was a common design and purpose between him and the others engaged in the commission of the crime, to do the act complained of, and use the weapon, if you find a weapon to have been used, in the manner and for the purpose intended by its use, and all these matters must be proven in the manner and to the extent indicated as being necessary in

order to establish the crime itself or the essential elements thereof.¹⁰

¹⁰ J. R. Johnston, Judge, in *The State v. Charles Morgan*, the famous "Blinky Morgan" case. Court of Common Pleas, Portage County, Sept. 7, 1887.

No. 232. Murder—Right of employee to protect himself against riotous strikers attempting to stop him from working—May take life to protect his own.—It is claimed by defendant, however, 1st. That such killing was justifiable on his part in order to protect himself from being killed, or from great bodily harm. 2d. That, at the time the fatal shot was fired, by reason of the injuries he had received at the hands of the mob, his reason was gone, he had lost the control of his faculties, and was incapable of forming an intention to commit a crime; in other words, he claims that he was temporarily insane, and did not understand and appreciate the nature of what he was doing and that it was wrong. 1st. As to the question of self defense. It appears in evidence in this case that the defendant was employed by a contractor to fill the trenches in the Town of ——. It also appears in evidence that the deceased, A. S., and a number of other laborers, who had been previously employed as trench diggers, had gotten into a dispute with their employer and had gone on a strike, and it was their combined purpose to permit no other person to perform any labor upon the contract till the matter in dispute between them and their employer was settled. And pursuant to this purpose, they went to the place defendant was employed and ordered him to stop work. This, it seems, he refused to do. The defendant had a right to solicit employment of the contractor and was guilty of no wrong when he accepted such employment and entered upon the discharge of his duties; (and I say to you) the deceased, A. S., and those engaged with him, when they assembled and went to the defendant and ordered him to cease work, became rioters and were guilty of an infraction of the laws of Ohio. They had no right to demand that the defendant cease work, and he was under no obligations to obey them when they did so order him. And if they assaulted him to compel him to desist, it was his right to repel the assault with force. He was under no obligation to retreat; and he had a right to use sufficient force to compel them to desist from their assaults upon him—even by taking the life of his assailants, or some of them, if that was apparently necessary in order to preserve his own life, or to protect himself from great bodily harm at the hands of the mob.

It is claimed, however, on the part of the state, that this

shooting was done by defendant out of a spirit of malice, wantonness, and revenge, growing out of the punishment he had received at the hands of the mob. Before proceeding further, I wish to say, however, that the burden is on the defendant to prove to you by a preponderance of evidence, either that he was justified in killing the deceased, or that he had temporarily lost the use of his faculties and did not appreciate and understand the nature of the act he was performing. By a preponderance of evidence, I mean the greater weight of the testimony, or, to state it in another form, if, after considering the evidence in all its bearings, you are of the opinion that the probabilities are in favor of the claims made on the part of the defendant, either that he was justified in doing the shooting, or that he had temporarily lost the use of his faculties so that he did not understand and appreciate the nature of the act he was performing, then the preponderance of the evidence would be made out, and your verdict, in that event, must be not guilty. But if the evidence was equally balanced, or the greater weight is with the state, then the defendant would not have the preponderance of evidence upon those claims.

As to the question of self-defense. The defendant had a right honestly and in good faith to solicit employment, and he had a right to engage in that employment, even though he had information that it was the purpose of the strikers to stop all persons from working.

Honest labor is a laudable employment, and no person shall be discouraged from engaging therein. Not only did he have a right to seek employment and engage therein notwithstanding the threats of the mob, but he had a right to arm himself for his own protection, however, with this qualification always in view: the employment must have been sought honestly and in good faith, with the single purpose in view of performing the labor for the wages agreed upon, and he must not have sought employment and engaged therein as a mere subterfuge for the purpose of inciting an attack from the mob. No person must seek and court a controversy, for if he does, he must take the consequences flowing therefrom. Evidence has been offered on the part of the defendant tending to show that when he turned over his scraper, started to hitch a tug, and resume work, one T., a member of the mob, attacked him, and that he was immediately set upon by other members of the mob with deadly weapons, and it is claimed on the part of the defense that he was compelled to use a deadly weapon in order to save his own life, or to protect himself from great bodily harm. If the defend-

ant did not purposely and intentionally bring on the assault, then I say, if, in the careful and proper use of his faculties, he believed and had reasonable ground to believe that he was in imminent danger of death or great bodily harm, and that his only means of escape was by taking the life of his assailants, or some of them, he was justified in taking the life of the deceased, A. S., even though in fact he was mistaken as to the existence of danger. In times of great excitement and apparent danger, where a person is called upon to act quickly, the same degree of prudence and judgment is not required of him that would be required had he an opportunity to deliberate upon his act. If, under the rules I have given you, you find that the defendant was justified in firing the fatal shot which resulted in the death of A. S., you need go no further, but your verdict will be not guilty. If, however, you find the defendant was not justified under the rules already announced in taking the life of A. S., then you will inquire further. Had the defendant so lost the use of his faculties, by reason of the injuries he had received at the hands of the mob, that he did not appreciate and understand the nature of the act he was performing, and that it was wrong? If he was in such condition of mind by reason of the injuries he had received as to deprive him of the ability to reason and to consider, and to know what he was doing, and the fatal shot was fired while he was in such condition, then he would be guilty of no crime, and your verdict should be not guilty. He is not entitled to an acquittal, however, on the ground of mental incapacity, if at the time of the shooting he had sufficient mental capacity and reason left to enable him to distinguish between right and wrong, and understand and appreciate the nature of his act and his relation to the party injured.

Sheets, J., in *State v. Van Skiver*, Auglaize Co. Com. Pleas.

No. 233. Malice in murder.—Malice is a distinctive feature in the charge of murder, for without it there can be no such thing as murder. It relates to the moral qualities of a man's acts. Its general use in law is to express an act done without any sufficient reason where the act is wrong in itself. As applied to a case of homicide it expresses that it was committed by the accused without any adequate reason therefor and under such circumstances of cruelty as to evidence a mind devoid of social duty and fatally bent on mischief. And because ordinarily no man may lawfully kill another, and intentional homicides are in general the result of malice and evil passions, or proceed from a heart devoid of social

duty, in every case of intentional homicide not otherwise explained by the circumstances it is presumed in the first instance that the slayer was actuated by malice, and the burden is placed upon him of showing the contrary, unless it appears from the circumstances adduced against him by the state. It is not necessary, however, that he should do this by evidence establishing the facts on which he relies to remove the inference of malice beyond a reasonable doubt. It is sufficient if the circumstances on which he relies for this purpose are established by a preponderance of evidence. If, after weighing and considering the evidence offered by the state, in connection with that offered by the defendant, the jury entertain a reasonable doubt as to the existence of malice, they should resolve that doubt in his favor; for when such a doubt exists after hearing and weighing all the evidence *pro* and *con*, the preponderance must certainly be with the defendant.

The absence or existence of malice in the act of killing marks the distinction between murder and manslaughter. For though, under our statute, there may be malice in an unintentional killing amounting to manslaughter, still malice in such case is a very different thing from malice in an intentional killing. For the term malice is always referable to the nature of the act it is intended to characterize; a malicious beating is one thing and a malicious killing is another and different thing.

Thad. A. Minshall, Judge in the Giddings case. Malice defined. State v. Turner, W. 20; State v. Gardner, 9 W. L. J. 411.

Malice presumed from killing; Davis v. State, 25 O. S. 369; State v. Turner, W. 20; State v. Town, W. 75. Or by use of deadly weapon the jury may infer it. Erwin v. State, 29 O. S. 186; Clark's Crim. Law., p. 160, note 126 and cases.

"The idea is not spite or malevolence to the deceased in particular, but evil design in general, the dictate of a wicked, depraved, and malignant heart; not premeditated hatred or revenge towards the person killed, but that kind of unlawful purpose which if persevered in must produce mischief." State v. Pike, 49 N. H. 399; Com. v. Webster, 5 Cush. 295. It has a broader meaning in this connection than in ordinary language. Commonly it signifies hatred to an individual. Malice is express or implied. Express when it is personal malice against an individual, which intends to take life. Implied malice is an evil and malignant purpose prompting the act resulting in death.

No. 234. Malice—Another form.—"Malice is a necessary ingredient in both murder in the first and murder in the second degree. Unless the prisoner was actuated by malice, he can not be said to have been guilty of murder in either degree. 'It is not easy to give it (malice) any exact definition. It relates to the moral qualities of a man's acts. Its general use in law is to express an act done without any suffi-

cient reason, when the act is wrong in itself. As applied to a case of homicide it expresses that it was committed without any adequate reason therefor and under circumstances of cruelty, as to evidence a mind devoid of social duty and fatally bent on mischief.' ¹

Malice in a legal sense does not necessarily mean spite, hatred, ill will, revenge, or jealousy. It may, however, include all or any of these qualities. Whenever a wrongful act which produces death is intentionally done, without just cause or excuse, and the purpose to kill is deliberated upon and premeditated, it is, in the absence of mitigating circumstances, murder in the first degree.' ²

¹ Giddings case, Judge Minshall's charge, page 422.

² D. F. Pugh, Judge in the Elliott case, Franklin Co. Approved by Sup. Ct. 1 Bishop's Cr. Law, Sec. 429, 3.

No. 235. Adequate or reasonable provocation.—While the definition of an adequate or reasonable provocation is so general, and perhaps somewhat indefinite, the law is explicit in its enumeration of some of the facts that do not constitute a legal provocation at all. Thus words of reproach, no matter how grievous they may be, and contemptuous and insulting actions or gestures, no matter how much calculated to excite indignation, or to arouse the passions, are insufficient to free the prisoner from the guilt of murder if all the material facts necessary to constitute that offense have been proved. The provocation to have the effect of alleviating the killing into manslaughter must have consisted of personal violence done by the deceased to the prisoner. Nor can the threats which were said to have been made by O. against the life of the prisoner be considered as a reasonable provocation to negative the inference of malice and reduce the killing to manslaughter.

D. F. Pugh, Judge, in the Elliott case, Franklin Co. Approved by Sup. Ct. That legal provocation means personal violence, see 26 W. L. B. 117, and cases cited there. Although provocation will not excuse, it will sometimes furnish ground for inflicting less severe punishment in homicide. Clark's Cr. L. 72. Where there is adequate provocation the offense may be manslaughter. Maher v. People, 10 Mich. 212. By adequate or reasonable provocation is meant a provocation, under the influence of which an ordinary man of fair disposition is likely to act rashly, without due deliberation or reflection. Maher v. People, 10 Mich. 212. What is a reasonable or adequate provocation is a question of fact for the jury. Provocation need not be at the time of the affray, but merely so recent as to show no time for the blood to cool. 4 O. C. C. 141. One day is sufficient for cooling time. 26 W. L. B. 116.

No. 236. "Deliberation" and "premeditation" in murder—What constitutes.—"The statute defining the crime is in these words: 'If any person shall purposely, and of

deliberate and premeditated malice, kill another, every such person shall be guilty of murder in the first degree.' The words *purposely, of deliberate and premeditated malice*, as applied to the act of killing, have much meaning. Purposely implies an act of the will; an intention; a design to do the act. It presupposes the free agency of the actor. *Deliberation* and *premeditation* require action of the mind. They are operations of the intellectual faculties, and require an exercise of reason, reflection, judgment, and decision."¹

"By the term 'deliberate,' it is meant that the purpose to kill was considered. It means that the purpose to kill was not the sudden, rash conception of an enraged mind, but that the mind of the prisoner was sufficiently cool and self-possessed to consider and contemplate the nature of the act to be done. The term 'premeditated,' signifies that the purpose to kill was thought about and considered before it was put into execution. The term 'deliberation,' does not mean that the purpose was brooded over, or that the prisoner's mind was absolutely calm and unruffled at the time he deliberated. It is only necessary that it should be sufficiently composed, calm and undisturbed to admit of reflection and consideration of the design. Nor do the terms 'deliberate' and 'premeditate' import that the purpose to kill had to be conceived, deliberated upon and premeditated any specific period of time before the killing was done. The question is not how long did the prisoner deliberate and premeditate, but did he deliberate and premeditate at all?

"Logically and legally some time must have intervened between the conception and execution of the purpose to kill, but it matters not how short the time was. The operations of the mind are so swift and deed follows thought so quickly that the deliberation and premeditation, and decision and act may all occur in a very brief space of time. The time will vary as the minds and temperaments of men and circumstances under which they are placed will vary. 'Deliberation and premeditation for a moment, as well as for a week, will render an intentional killing murder in the first degree.' It is immaterial whether the deliberation was in forming the purpose to kill, or in the continuance of the design after it was formed until it was executed. The distinctive difference between murder in the first and murder in the second degree is that there is no deliberation and premeditation in murder in the second degree. There must be purpose and malice as in murder in the first degree, but the malice need not be of the deliberate and premeditated character. If the purpose

¹ Judge Birchard in *Clark v. State*, 12 O. 495.

to kill appeared and existed for the first time in the prisoner's mind in the act of killing, the killing was only murder in the second degree. So, also, if the intention to kill was formed and executed in and from a sudden transport of passion, aroused by provocation, but the provocation was not sufficient, in law, to reduce the killing from murder to manslaughter, it would only be murder in the second degree."²

² D. F. Pugh, Judge, in the Elliott case. Approved by Supreme Court. Deliberation and premeditation defined. *Turner v. State*, W. 20; *Shoemaker v. State*, 12 O. 43; *Burns v. State*, 3 W. L. G. 323. See Bishop's Cr. Law, Sec. 728.

237. Murder—First degree—Meaning of words “purpose,” “unlawful,” and “feloniously.”—Under the first count it is essential to the conviction of murder in the first degree, that it appear that the defendant, in the manner and form charged, at the time and place charged, killed the said H. unlawfully, feloniously, purposely, and of deliberate and premeditated malice. An act is done unlawfully when done in violation of the law; to do an act feloniously is to do it criminally. The word “purpose” is used in the statute in its plain and ordinary signification. It means an act done intentionally, not accidentally or by mischance. It imports an act of the will, intention, a design to do an act. Ordinarily the purpose to kill is to be gathered or deduced from the circumstances under which the killing is done. If the instrument used in inflicting the mortal wound was a deadly weapon, and it is willfully and in a manner purposely calculated to destroy life, the jury may infer the intent or purpose to kill by such use of the weapon.¹ It is a general principle that what a man does willfully he intended to do, and intends the natural consequences of his voluntary act, unless the circumstances in this particular case show the absence of such intent.²

¹ Bishop's Cr. Law, Sec. 680 and cases. An instruction that if the jury “find from the evidence that the defendant used a deadly weapon *in this case*, and that death ensued from the use of such deadly weapon, then the law raises the presumption of malice in the defendant, and also an intent *on his part* to kill the decedent,” was held erroneous. 29 O. S. 192.

² Wm. R. Day, J., *State v. Webster*, Trumbull County Common Pleas.

The “purpose” in general is proved from circumstances. *Gardner v. State*, W. 392. See 8 O. S. 98; 8 O. S. 306; 10 O. S. 459.

No. 238. Proof of purpose to kill—Malice—Deliberation and premeditation.—Now as to the proof of the purpose to kill, of malice, deliberation, and of premeditation. Intention and malice are of the heart and mind. Neither was probably ever proved to a jury by direct, positive evidence. The only

possible direct witness to prove that the prisoner's purpose was to kill O. and that he was actuated by malice was the prisoner himself, and if he had meant to testify that his mind and heart were in that condition before and at the time O. was killed, he would have plead guilty, which he did not do, but denied all of the incriminating circumstances which the state's evidence tended to prove. The existence or absence of malice and of purpose to kill is an inference which must be drawn by you from all the facts in the case. The emotions of the prisoner's heart and the operations of his mind at the times mentioned can only be revealed to you by his acts and his declarations. You have no power to ascertain the exact condition of his mind and heart at the times in question; the best you can do is to infer what it was from his acts and declarations. In determining this you should also consider what he has said here on that question in his testimony, if you believe him, and also all the other evidence bearing on this question. I have already said to you that a person is presumed to intend what he does. When a man performs an act which he knows will produce a particular result, from our common experience he is presumed to have anticipated and intended that particular result. The intention to kill, malice, deliberation, and premeditation may be proved by circumstantial evidence. The circumstances from which they may be inferred are various. They may consist of previous threats of the prisoner to kill the man who was killed, preparation of weapons, search for the man who was afterwards killed, absence of provocation just before and at the time of the killing, dangerous nature of the weapon used to kill,¹ the manner of using it, and the subsequent expressions of gratification by the prisoner over the killing of the deceased, if you find such facts have been proved. It is hardly necessary to add that the purpose to kill, malice, deliberation, and premeditation are all material facts and require to be found proved, in a case like this, beyond a reasonable doubt.²

¹ Use of deadly weapon does not raise a presumption of malice and intent to kill, but the jury must consider all the circumstances. *Erwin v. State*, 29 O. S. 136.

² *D. F. Pugh*, Judge, in the *Elliott case*.

No. 239. Person presumes reasonable consequences of his acts.—But the law presumes that every person intends the natural, probable, and reasonable consequences of his own acts intentionally done. "Wrongful acts, knowingly or intentionally committed, can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intention." To illustrate

part of this rule, if a person voluntarily or intentionally does an act, or aids, assists, and encourages another to do an act, whose natural, reasonable, and probable tendency is to destroy another's life, the conclusion may be drawn that he intended to destroy that life.

D. F. Pugh, Judge, in the Elliott case. "As a rule of evidence, a party is presumed to intend the natural consequences of his own acts." *Robbins v. State*, 8 O. S. 131.

No. 240. Manslaughter—What is.—What are the circumstances which will repel the imputation and inference of malice that grows out of an intentional killing, and will reduce the offense from murder to manslaughter?

The absence of malice is the trait of a case of homicide which makes it manslaughter.

When a person is killed "under the influence of passion, or in the heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time for the blood to cool and reason to resume its habitual control, and is the result of temporary excitement by which the control of reason was disturbed rather than by wickedness of heart. or cruelty, or recklessness of disposition," it is only manslaughter.¹

When the killing is done under such circumstances, the law in its leniency imputes it to the infirmity of human nature and not to the malignity of the heart.

One of the established rules of law is that the act of killing, or aiding or assisting in killing, to be manslaughter must be directly caused by the passion arising out of the provocation. It was not sufficient that the prisoner's mind was agitated by passion arising from some other provocation, or provocation given by some other person.

Another rule is that the provocation must have been given at the time of the commission of the offense, or so short a time before that there was not time for the blood to cool and reason to resume her empire over the mind.

It has been said that it (provocation) is whatever will "commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of reflection."²

The provocation must be in itself "calculated to provoke a great degree of resentment," and such as ordinarily superinduces a great degree of violence. If it is so slight and trivial that a great degree of violence does not usually follow, it is not reasonable provocation.

¹ *Moher v. The People*, 10 Mich. 212.

² 13 Tex. App. 563.

It has also been said by an able judge that, in a case like this, the jury "should take into consideration all the circumstances preceding, as well as attending the commission of the homicide, and inquire what would ordinarily have been the conduct of men in general under like circumstances," and that should the jury "find that the defendant did no more than might be expected from men in general under like provocation, the law in its tenderness to human frailty would require"³ the jury to say that the killing was only manslaughter.⁴

³ Gidding case, 424.

⁴ D. F. Pugh, Judge, in the Elliott case.

No. 241. Self-defense—What constitutes.—Under certain defined circumstances, the laws of God and man give the right to take life in self-defense.

"When a person in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavors to kill him, the person so assaulted, without retreating, although it be in his power to do so without increasing his danger, may kill his assailant to save his own life, or prevent enormous bodily harm."¹

"Homicide is justifiable on the ground of self-defense, where the slayer, in the careful and proper use of his faculties, *bona fide* believes, and has reasonable ground to believe that he is in imminent danger of death or great bodily harm, and that his only means of escape from such danger will be by taking the life of his assailant, although in fact he is mistaken as to the existence or imminence of the danger."²

The claim of self-defense implies, presupposes, that O. was intentionally killed. It is plain that when one kills another in self-defense he intends to do it, but it would not be unlawful killing, although intentionally done.

Before you can acquit the prisoner on the ground of self-defense, you must be satisfied that several facts, which I shall now enumerate and explain, were, by the evidence, proved.

1. You must be satisfied that O. was the assailant; that he began the shooting.

2. You must be satisfied that O. manifestly and maliciously intended and endeavored to kill or do great bodily harm to the prisoner and P. E., or one of them. Did O. intend to do that? And in doing it, was he actuated by malice? Or was he simply defending himself? Trying to save his own life? These are the questions for your determination under this head.

¹ Erwin v. State, 29 O. S. 187.

² Marts v. State, 26 O. S. 162; Darling v. Williams, 35 O. S. 59.

3. You must be satisfied that the prisoner, in good faith, believed, and had reasonable grounds for believing that he was in danger of losing life, or sustaining great bodily harm from the violence of O. That belief must have been honest and sincere. The bare belief, however, was not sufficient; there must have been reasonable grounds for believing that there was such danger, and they must have acted under the influence of such belief alone. In determining whether there were such reasonable grounds for the belief you are not to conceive of some ideal reasonable person, but you should, as nearly as possible, put yourselves in their position, with their physical and mental equipment, surrounded with the circumstances with which they were surrounded, and exposed to the influences to which they were exposed. Does the evidence show that they had such reasonable grounds for believing that O. was about to take their lives, or the life of one of them, or to do great bodily harm to them or one of them, just before and at the time he was killed?

4. You must be satisfied that the danger of losing their lives, or the life of one of them, or of both or one of them sustaining great bodily harm at the hands of O. was, at that time, actually or apparently imminent and irremediable. The law regards human life as the most sacred of human interests committed to its protection, and there can be no successful interposition of self-defense unless the necessity for taking O.'s life was, at least, apparently pressing and urgent at that time—unless, in a word, the taking of his life was the reasonable resort of the prisoner, or one of them to save their own lives, or the life of one of them, or to avert great bodily harm to both, or one of them. It is true they had a right to act upon appearances—upon such appearances as would induce a reasonable person in their position to believe that there was such immediate danger, and that if the appearance turned out to be fallacious, they were not to be blamed.

5. You must be satisfied that the killing of O. was the only means of escape from the danger mentioned. If O.'s life was taken after the appearance of danger disappeared, the claim of self-defense must not be allowed. Although O. may have been the aggressor, although he may have begun the shooting, yet, if you find that the danger of death, or of great bodily harm from O. could have been escaped from, could have been avoided, without taking his life, the prisoner can not shelter himself behind the law of self-defense; it is no defense in such case.

6. You must be satisfied that they were without blame, without fault. The law of self-defense does not imply the

right of attack, nor does it permit a man to kill another for revenge.³

³ D. F. Pugh, Judge, Elliott case. Approved by Sup. Court.

No. 242. When a person may take the life of an assailant in self-defense.—It is a part of the law of this state, as well as of other states and countries, that, under certain defined circumstances, a person may, in self-defense of his own life, or to avoid great bodily harm, take the life of an assailant. And when this right is legitimately exercised, the homicide so committed, whether justifiable or excusable, according to the distinction at common law, is not an unlawful taking of life; and is, therefore, neither murder nor manslaughter. This right constitutes the boundary line between manslaughter and a lawful homicide.

It is generally agreed that the right of self-defense is founded in nature and is one of the rights not surrendered to society according to the theory of the social compact. But in a state of society it is necessarily so far modified by the laws as to be limited to the cases where it would result in imminent danger to life, or of great bodily harm, if the only remedy of the peaceable and well-disposed citizen lay in an appeal to the laws, or the strong arm of the state. If the exercise of the right were not thus restricted, violence would beget violence, and there would be an end of civil government. There must, however, be imminent danger to life or of great bodily harm, before the taking of life in self-defense can be resorted to by anyone in any case.

But reason suggests and the law makes a distinction between the case of a person driven to the necessity of taking life in self-defense in a conflict provoked and incited by his own wrong, and that of one reduced to such necessity in a conflict that was neither sought nor provoked by him. In the case *when a party assaulted is in the wrong*, he must, before taking the life of his assailant to save his own life or to avoid great bodily injury, flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit, for it may be so fierce as not to allow him to yield a step without manifest danger to his life or great bodily harm, and then, in his defense, he may kill his assailant instantly.¹

But in a case where the assailed party is not in the wrong, neither provoked nor incited the conflict, and was assailed while in the pursuit of his lawful business, he may, without

¹ Stoffer v. State, 15 O. S. 47.

retreating a step, kill his assailant if necessary to protect his own life, or to avoid grievous bodily harm.

The danger must in either case be actual or apparent, and the party killing must have honestly believed that he was in danger of losing his own life, or of suffering some great bodily harm, before killing his assailant. And it is not enough that the party killing honestly believed that there was imminent danger to himself, the circumstances must have been such as would have afforded a reasonable ground for such belief. Of this the jury must judge from the circumstances as developed by the testimony. If the appearances were such as would have alarmed a man of ordinary firmness, and have impressed him that such danger was imminent; and if the assailed party honestly believed such to be the case, it is not material whether the danger was real or not. Thus, to make the application to this case, if you should find that the deceased threatened to kill the defendant, and, suiting his act to his word, hastily reached with his right hand to his hip-pocket, as if to draw and use a deadly weapon, and that the defendant, as would any man of ordinary firmness, then honestly believed that the deceased intended to instantly kill or seriously wound him, in such case it is not material to the defendant's right of self-defense whether, as a matter of fact, the deceased had or had not a weapon.

If, when violently assaulted, a party were required to act at his peril in judging whether there was real ground for apprehending imminent danger, before resorting to such measures as the circumstance seemed to require for his safety and protection, it might be as hazardous to defend himself in the first instance as to risk the ultimate result of what appeared to be a violent and malicious assault upon his person and life; and he might escape from what appeared to be the imminent danger to be tried and condemned as a man-slayer, where, had the facts been what the circumstances indicated, he would be excused.²

² Thad. A. Minshall, Judge, in the Giddings trial; 29 O. S. 187; 26 O. S. 162; 35 O. S. 59.

No. 243. Homicide—Self-defense—Right to repel assault.—"If the defendant and his co-defendants were in the exercise of their lawful rights in passing along the streets at the time of the conflict wherein one was killed, and neither of the accused parties began the affray or attack, then the defendant and those accused with him had the right to repel the assault with such force as was necessary to do so, and had a right to defend themselves from danger to life or great

bodily harm; and if they were suddenly assailed or surrounded by superior numbers armed with weapons dangerous to life, or calculated to do great bodily harm, the defendants had a right to stand on their defense, to repel force by force, even to the taking of life, if they believed and had reasonable grounds to believe that it was necessary to do so to prevent either death or great bodily harm to themselves, and if necessary they may use such weapons as will accomplish the purpose."

From *Goins v. State*, 46 O. S. 457.

No. 244. Manslaughter—Person present doing no overt act not aider.—"If the jury find from the evidence that the principal named in the indictment did take the life of the deceased, but did it in a sudden quarrel, or in the heat of passion, his offense would be but manslaughter; and if you further find that the defendant did no overt act and took no active part in the killing, but was merely present when the quarrel arose or fight began, you can not in such case find him guilty as an aider and abettor of the principal."

Goins v. State, 46 O. S. 457.

No. 245. Homicide—Common defense from attack.—"If the only purpose made known to the defendant prior to the killing of the deceased, and the only one contemplated or entered upon by him, was a defense of himself and companions from an attack by a party of men superior in numbers and strength which had been threatened, and neither the defendant nor his comrades were to be aggressors or attack the opposing party, then such common purpose of defense merely was not unlawful and criminal."

From *Goins v. State*, 46 O. S. 457.

No. 246. Homicide—Son may defend parent.—"A son has the right to commit an assault in the defense of his mother, if the mother be not in the wrong. If at the time a son does commit an assault in the defense of his mother while she is using such means as are necessary to repel an assailant from entering her home, or to prevent such person from forcibly entering her home, such assault, if so made by the son, where he, in the careful and proper use of his faculties, in good faith believes and has reasonable ground to believe that his mother is in imminent danger of great bodily harm, and that her only means of escape from such danger will be by the son taking the life of such person, the son does not thereby commit an unlawful act, even though in fact

the son be mistaken as to the existence or imminence of the danger. So, in this case, if you are satisfied from the evidence that the defendant M. M. was assaulting the deceased to prevent him from entering her home forcibly and against her will, and that during the time of such conflict the defendant S. M., in the careful and proper use of his faculties, in good faith believed and had reasonable ground to believe that M. M. was in imminent danger of great bodily harm, and that her only means of escape from such danger was by committing the assault that he did commit, then S. M. is guilty of neither murder nor manslaughter, and as to him, your verdict must be accordingly, even though S. M. was in fact mistaken as to the existence or imminence of such danger to his mother. But you must be satisfied that S. M. believed in good faith that M. M. was in danger of great bodily harm from the decedent, there must have been reasonable grounds for believing that there was such danger, and that belief must have been honest and sincere; the bare belief is not sufficient; and he must have acted under the influence of such belief alone. And in determining whether there were such reasonable grounds for the belief, you should, as nearly as possible, according as disclosed by the evidence, put yourself in their position, with their physical and mental equipments, surrounded with the circumstances with which they were surrounded. Does the evidence show that he had such reasonable grounds for believing that the deceased was about to do her great bodily harm? Consider the evidence as to the conduct of the parties at the time and immediately previous to the acts which resulted in the death of the decedent.

Melhorn, Judge, in *State v. Miner*. The killing of a person in defense of those standing in the relation of husband and wife, parent and child, etc., is regarded in law as the act of the person defended, and is excused to the same extent as if in fact committed by him. *Clark's Cr. L.*, 157, and cases cited; 1 *Bishop's Crim. Law*, Sec. 877.

No. 247. Justifiable homicide.—Homicide is justifiable on the ground of self-defense when the slayer, in the careful and proper use of his faculties *bona fide*, believes and has reasonable ground to believe that he or his family is in imminent danger of death or great bodily harm, and that his only means of escape from such danger will be by taking the life of the assailant, although in fact he is mistaken as to the extent or imminence of the danger; and where one is assaulted in his own home, or the house itself attacked, he may use such means as are necessary to repel the assailant, or to prevent his forcible entry or material injury to his home, even to the taking of life. But a homicide in such a case would

not be justified unless the slayer, in the careful and proper use of his faculties, in good faith believes and has reasonable ground to believe that the killing is necessary to repel the assault or prevent his forcible entry.

Melhorn, J., in *State v. Mary Miner, et al.* Defense of self or home. *State v. Peacock*, 40 O. S. 333.

No. 248. Evidence of previous character and reputation in homicide.—The defendant has placed his previous character and reputation as to being a man of peace and quiet in evidence. If you find that previous to this difficulty he sustained a good reputation for peace and quiet, you will weigh it in his favor for what you, in your honest judgments, may think it is worth. Where the question to be determined by you may be close, it should be sufficient to turn the scale in his favor.

It not only sheds light upon the subject of inquiry, but it is also admitted as a rule of public policy, as a reward held forth by the law to those who, by conformity to its commands, establish characters for peace and quiet. Where one who has established such a character by his conduct as a good citizen may use it in repelling the charge of crime, he will also be the more careful not only to form it, but also to retain it. It is, however, only a circumstance favorable to his innocence. As a general rule, a man's character for anything is the outgrowth of what he is, and if by his conduct and deportment among his fellows he has earned the reputation of being a man of peace and quiet, it affords grounds for believing that he is what, by his conduct, he seems to be; and the impartial mind is the less ready to conclude that such a one has acted contrary to what may seem to be a law of his life.

The weight to be given to the hitherto good character of the defendant for peace and quiet must be such as the jury, under all the circumstances, think it should receive. It is very relevant to, and of much weight upon the question of malice; for the existence of such a character can not consist with the element of malice until it has been uprooted and destroyed. It is also quite relevant to the question whether the defendant, in committing the homicide, acted in self-defense; for here, again, he could not, without honestly believing that he was in imminent danger of great bodily harm or loss of life, have taken the life of his fellow if he was by habit a peaceful and quiet man.

Thad. A. Minshall, Judge, in the Giddings case.

INSANITY.

No. 249. Insanity defined.—Insanity has been defined to be a disease of the mind; a disease of the organ that thinks, but what is the mind? What is the organ that thinks? It is the subtle essence which is not cognizant to the senses of the outsider or the observer. It can not be subjected to analysis as long as it is living. It can not be inspected by either lens or microscope, or measured by any instruments. "The molecular changes which accompany thought cease at death," and while living, the physical functions of the brain can only be guessed at. It has been claimed that insanity is such a derangement of the mental faculties of the person whose sanity is in question that he is unable to reason correctly. But it differs so much in kind and degree that medical science has never been able to formulate a definition precise enough to be useful in the varying circumstances of each individual case. Medical men whose labors and studies are in the line of mental disorders do not agree upon a definition of insanity, or as to the existence of it in any particular case. Dr. Hammond, in his work of *Diseases of the Nervous System*, defines insanity to be: "A manifestation of disease of the mind characterized by a general or partial derangement of one or more of the faculties of the mind, and in which, while consciousness is not abolished, mental freedom is perverted, weakened, or destroyed." This is too abstract and general for practical purposes. What we want is a working definition, a legal definition, a definition that will aid us in forming a careful judgment in this case. The law supplies that want. The law's definition of insanity, however, does not harmonize with the conclusions of medical science. The observations and language of another judge which are apropos in this proceeding: "On both sides of an invisible line are multitudes of cases where it is impossible to say with confidence whether the mind is sane or insane. But when the question of responsibility is presented to a court there is an imperative necessity for deciding, and the further necessity of deciding it by rule. An arbitrary line, if none can be discovered, must be drawn. It must be drawn so as to be certain, comprehensible, and broad; certain enough for the conduct of life; comprehensive enough to be clearly explained to a jury of twelve plain men; and broad enough to cover

many cases without confusing unskilled minds with minute distinctions. The refinements of medical science must be pretermitted. The first necessity in the administration of justice must be considered, and that is the safety of the community, the protection of the greater and more valuable portion of the community who are not insane. A rule must be laid down which will not have the effect of letting criminals escape punishment through the bewilderment of juries. Tenderness to the weak, however commendable in itself, is not to be so stretched as to endanger the lives or even the property of the public." These are some of the reasons which inspired and made a legal definition of insanity a virtue of necessity and a dictate of wisdom.

Pugh, J., in *State v. Kalb*, Franklin County Com. Pleas. For interesting cases defining insanity see *Com. v. Rogers*, 7 Metc. 500; *McNaghten's case*, 10 C. & F. 200; *State v. Felter*, 25 Ia. 68; *Parsons v. State*, 81 Ala. 577 (good case collecting cases); *Dunn v. People*, 109 Ill. 635; *Guiteau's case*, 10 Fed. 161.

Must be proved by a preponderance of the evidence and not merely creating a doubt. 12 O. 483; 2 O. S. 54; 10 O. S. 598; 23 O. S. 349; 31 O. S. 111, 4 C. C. 101.

A very instructive opinion on insanity is *Clark v. State*, 12 Ohio 483, and Judge Birchard's instruction on page 495 of the report is a very good one to follow.

No. 250. Insanity as a defense.—[*Precede with part in ante No. 249.*]—It is a well-understood rule of law that an insane person can not be convicted of a crime. The state has no interest in the conviction of an irresponsible person; it would offer no example to others, nor would it deter others from committing a crime any more than would the punishment of a dumb brute. By reason of a lack of knowledge by men of science, as well as the legal fraternity, there is great difficulty in defining insanity in language which will include any and all cases. When insanity of a person is not of a marked character, and is set up as a defense to a charge of murder, courts and jury must move with caution, and carefully weigh every circumstance that may shed any light upon the question. It is conceded by the physicians that there is a form of mental disease called transitory insanity. It is said that it may be superinduced in various ways, and is more likely to occur in persons of a highly nervous temperament.

The perplexing question in regard to what may be termed transitory insanity is, that the subject may, as is said, be sane up to the moment of committing, and immediately after committing a crime. Whether such a form of insanity exists is a question of fact and not of law. It is a question

which the jury must determine from the evidence, by the testimony of physicians of great experience in medical science, and those in particular who have devoted themselves to mental pathology, or diseases of the mind. For it is an old maxim that credit is to be given to everyone for the knowledge he possesses in the practice of his own art.

A sane man is one whose senses bear truthful evidence; whose understanding is capable of receiving that evidence; whose reason can draw proper conclusions from the truthful evidence thus received; whose will can guide the thought thus obtained; whose moral sense can determine the right from the wrong growing out of that thought, and whose act can, at his own pleasure, be in conformity to all these. One not possessed of these faculties is not a sane man.

Hence the power to determine the right from the wrong in a given case, not in the abstract, but as applied to the particular parts and circumstances of that case, the case in which his sanity arises as a question for determination, together with the power of will, adequate to accept the right and reject the wrong, is a test of sanity or insanity.

One possessed of such faculties of the mind and power to determine and control his acts is a rational being, a free agent, a responsible subject of the law. One without these faculties of mind and power of will is not a rational being, and is not responsible for what he does. Courts in the main, judge of the mental condition of a man from the external indicia of the mind, in which they are consistent with all the analogies of the law of evidence.

Then if you find, by a preponderance of proof, that at the time the defendant shot and killed the deceased he was laboring under some mental infirmity, rendering him incapable of determining that it would be wrong to take the life of the deceased because he had been the occasion of his domestic troubles, that his duty to his fellowman required that he should abstain from so doing, that he would be punished by the laws if he killed him under such circumstances, and slew the deceased from the uncontrollable impulse of his mental disorder, without power of reason or will to see that it was wrong and abstain from doing it, not from the impulse of passion excited from his domestic troubles, with which the deceased had been connected, then you should acquit him.

On the contrary, if you find that he did not know that it was wrong and punishable by the law, if he could have restrained himself, if it was not the impulse of his mental disorder, if it was the impulse of the passion of anger, or a

feeling of malice excited by the wrongs he had suffered from the conduct of the deceased, then he was legally responsible; and if he intentionally killed W. he was guilty of manslaughter, if not more, unless he killed him in the lawful exercise of the right of self-defense.

All persons arrived at the usual years of discretion are presumed sane and accountable for what they do.

And when it is claimed that a party charged with crime is not sane he is not amendable to the law for what he does, the burden is placed on the defense by a preponderance of the evidence to establish this to the jury. And if this is not done the defense is to be rejected.

Thad. A. Minshall, Judge, in the Giddings trial.

No. 251. Insanity as a defense—Burden of establishing.—"To defeat the legal presumption of sanity, which meets the defense of insanity at the threshold, the burden of establishing mental alienation of the accused affirmatively rests upon the accused."

From *Bergin v. The State*, 31 O. S. 111. This has long been the rule in Ohio as shown by the following cases: *Clark v. State*, 12 O. 483; *Leoffner v. The State*, 10 O. S. 599; *Sylvus v. State*, 22 O. S. 90; *Bond v. The State*, 23 O. S. 349; *Weaver v. The State*, 24 O. S. 584.

INTOXICATING LIQUOR.

No. 252. Action by wife against person selling or furnishing liquor to intoxicated person—Liability of person furnishing.—"By statute it is made unlawful and punishable for any person to furnish to any person who is at the time intoxicated, or in the habit of getting intoxicated, any intoxicating liquors whatsoever, unless given by a physician in the regular course of his practice.

"This law makes it unlawful to furnish intoxicating liquors contrary to its provisions. If the defendant so furnished intoxicating liquors to the husband of the plaintiff, he being at the time, to the knowledge of the defendant, intoxicated, or in the habit of getting intoxicated, the act or acts of so furnishing liquor were unlawful.

"The defendant can only be made responsible for such instance of intoxication of the plaintiff's husband as may have been caused in whole or in part by liquors which he may have so illegally sold or furnished.

“If A. B. was on a particular occasion or occasions intoxicated during said period, to which intoxication the liquors of defendant, so sold or furnished to A. B., did not contribute in whole or in part, the defendant is not responsible for such intoxication. But if defendant’s liquor, so sold or furnished to A. B. during such period, in part caused the intoxication of said A. B., the defendant would be responsible for such instance of intoxication, although liquor which was not obtained from defendant also in part caused or contributed to such instance of intoxication. And if the liquor so sold or furnished by defendant to A. B. caused his intoxication, either alone or in connection with liquor not obtained from defendant, in a sufficient number of instances to satisfy you that A. B. was habitually intoxicated by such liquor of defendant acting alone, and also acting with such liquor of others, the jury should find that defendant caused the habitual intoxication of A. B.

“But if the liquor of defendant, so sold or furnished, caused in whole or in part the intoxication of A. B. in a less number of instances than is required to make him habitually intoxicated, yet, if defendant’s liquor, thus sold or furnished to A. B., caused his intoxication in one or more instances, it would be sufficient, on this second point, to authorize a finding for plaintiff. Whether the intoxication which may have thus been caused by defendant was in but a single instance, or occasional, or habitual, will be an important subject of consideration upon the point of injury to plaintiff’s means of support, or in assessing damages.

“If it be found that A. B. was intoxicated in any instance or instances, as to which the jury are not satisfied that the defendant’s liquor, so sold or furnished to A. B., caused the intoxication in whole or in part, such instances of intoxication can only be considered by you upon the question whether A. B. was in the habit of getting intoxicated, and the defendant should not be held responsible for any injury to the plaintiff which may have resulted from such intoxication.”

From *Sibila v. Bahney*, 34 O. S. 399. See *Baker v. Beckwith*, 29 O. S. 314.

No. 253. Action by wife for sale of, to husband—Evidence of sales made after suit.—“If it be found from the proof that defendant, since the commencement of the action, has sold intoxicating liquors to plaintiff’s husband in violation of law, that would afford no ground whatever for a recovery on the part of the plaintiff; but if it be found that the plaintiff ought to recover for intoxicating liquors sold to her hus-

band during — years previous to the beginning of this suit, the jury has a right to consider the fact that it has been repeated, and the unlawful sale to him indulged in since its commencement, for the purpose of throwing light upon the mind of the defendant at the time he sold the liquors during the four years prior to the filing of plaintiff's petition; the jury has a right to consider it in aggravation of damages, or as a reason why they should or may be increased. Her right to recover can not be founded upon any such sales, but the most that can be done would be to increase her recovery by way of exemplary damages for such sales, if she is otherwise entitled to a verdict."

From *Bean v. Green*, 33 O. S. 444.

No. 254. Intoxicating liquors—Illegal sale of—Who is keeper of place.—"If the defendant had the possession, care, and control of the room, and managed, conducted, and controlled the business transacted therein, and sold liquor in violation of law, then he was the keeper of the room within the meaning of the statute, whoever may have been the actual owner of the property."

From *Schultz v. The State*, 33 O. S. 276.

No. 255. Action by wife for sale of liquor to husband—Damages—Another form.—"To authorize a recovery it must appear that J. W., the husband of the plaintiff, was a person in the habit of getting intoxicated. It must also appear that the defendant knew that he was a person in the habit of becoming intoxicated as it appears in the petition. It must appear that the plaintiff gave notice not to sell to her husband intoxicating liquors. This notice must be given in the presence of witnesses or a witness. It must also appear that the notice was given at the time alleged in the petition; it need not be done at the exact time alleged, but near about that time. It must appear that the plaintiff has been damaged in her means of support, or her person, on account of alleged illegal sales, if any were made by the defendant to the husband. Should you find that the defendant sold intoxicating liquors to J. W. in violation of law, within the time charged in the petition, or about the times charged in the petition, and that the plaintiff sustained damages by reason of the intoxication of J. W., caused thereby to her person, property, or means of support, the fact that other persons sold liquor to J. W. in violation of law, within that period, and which liquor may have contributed to increase the intoxication and consequently to enhance the injury resulting to

the plaintiff therefrom; such facts, if shown to have existed, will not exonerate the defendant from the consequences of his wrongful acts; but on the contrary, he will still be responsible for all the injury resulting from the intoxication of J. W. to the plaintiff caused by the sales of liquor.

If you can separate the damages resulting from the intoxication caused by illegal sales to the said J. W. by the defendant from the damages resulting from the sales to J. W. by others, you must do so. But if such separation can not be made, you will render your verdict against the defendant for all acts resulting in pecuniary damages to the plaintiff, in person, property, or means of support, by reason of the intoxication of J. W. to which the sales of liquor by the defendant contributed.

Gillmer, J., in *Whittaker v. Walsh*, Trumbull Co. Com. Pleas.

No. 256. Selling and furnishing intoxicating liquors to habitual drunkards—What constitutes a sale.—By statute in Ohio it is provided that whoever sells intoxicating liquors to a person in the habit of getting intoxicated shall be punished as is provided in said statute. It is further provided by the statute, among other things, that whoever buys for and furnishes a person who is in the habit of getting intoxicated any intoxicating liquor shall be punished as is provided in said statute.

You will observe that there are two kinds of offenses charged in the several counts of the indictment in this case. One is the selling of intoxicating liquor to a person in the habit of getting intoxicated, and the other is that of furnishing intoxicating liquor to a person in the habit of getting intoxicated.

To constitute a sale a person procuring liquor must have paid for the same or agreed to pay for the liquor. As matter of law, the supplying of intoxicating liquor to a person in the habit of getting intoxicated, to be drunk by him, is the furnishing of liquor within the meaning of our statute, although it may have been purchased by another and supplied by the seller to a person in the habit of getting intoxicated in pursuance of such purchase.¹

If a person in the habit of getting intoxicated should go into a saloon with another person, and such other person should buy from the saloonkeeper intoxicating liquor for himself and such habitual drunkard, to be drunk by them there before the saloonkeeper, such act would be a furnishing

¹ See 25 O. S. 381.

by the saloonkeeper to such habitual drunkard, although such third person paid for the intoxicating liquor.²

² Nye, J., in *State v. Kelley*, Lorain Co. Com. Pleas.]

No. 257. Same continued—Intoxication defined.—“A person may be said to be intoxicated when he is so much under the influence of intoxicating liquor that he is unfitted and disqualified from attending to and performing the usual duties and business of life. Intoxicating liquor affects different individuals in different ways. One individual it renders dull and stupid, so that while he may possess the powers of locomotion his intellect is so stupefied that he is wholly incapable of attending to any matter of business; another is rendered excited and noisy, and for a time positively insane, although he may be physically stronger and more active than when sober. In this instance the effect is upon the mind, disqualifying the man intellectually from being fit to be entrusted with the performance of any important business.

“On the other hand, another person will exhibit intoxication by losing all control over his muscular action, so that he will be unable to walk or move, while his mind may be tolerably clear and capable of comprehending a matter of business. Still the man is physically disqualified by the intoxication from attending to his ordinary business. There are other persons who are mentally and physically able to drink large amounts of intoxicating liquors without losing their mental ability, or all control over their muscular action; but yet the effort to maintain this self-control is so great that they are wholly incapable of attending to any business, or performing any duty resting upon them as men and members of society. There are degrees of intoxication. In order to be intoxicated it is not necessary that the person should be so drunk as to be wholly without the ability to think or move; it is enough if he is so far affected as to render him unfit and disqualified for the performance of ordinary callings—so affected that it would be unsafe to trust him with the driving of a team, the care of a mill, the making of a contract, or the sale of property, with the steering of a steamboat, with the prescribing as a physician, or the giving of advice as a lawyer. A person so affected by intoxicating liquors is truly in a state of intoxication and can truly be said to be intoxicated.”

Nye, J., in *State v. Kelley*, Lorain Co. Com. Pleas.

No. 258. Same continued—Habitual drunkard defined.—This word implies more than a single act of intoxication—

more than an occasional act of intoxication. It implies a series of acts; acts of intoxication so often repeated that it may be reasonably expected that the individual will become intoxicated whenever he can obtain the means of so doing. When a person has acquired such a taste for intoxicating liquors, and has so far lost the control of his will that he will usually drink to excess whenever he can obtain it, he has emphatically acquired the habit of getting intoxicated. Nor need the acts be repeated in rapid succession; it is enough to constitute the habit if the person gets intoxicated whenever the opportunity offers, although these opportunities may be at considerable intervals in lapse of time. The habit is still formed, the individual becomes intoxicated whenever the means are at his command.

Nye, J., in *State v. Kelley*, Lorain Co. Com. Pleas.

No. 259. Intoxicating liquors—Sale within two miles of agricultural fair.—Your attention is directed to the material things which it is necessary for the state to make out to entitle it to the verdict of guilty as charged in the indictment. First: That the sale of intoxicating liquors was made by the defendant to C. W. Second: That said sale of intoxicating liquors was made within two miles of the place where an agricultural fair of the — County Agricultural Association was being held. Third: That said offense was committed in the County of —, and State of Ohio. Fourth: That said offense was committed on or about the — day of —, 18—. If you should find from the evidence that said offense was committed on or about that time, near to that time, that would be sufficient so far as the date is concerned, provided said offense was committed during the time that the agricultural fair of the — County Agricultural Association was being held. The state must establish each of the foregoing propositions by evidence that satisfies your minds of their truth beyond a reasonable doubt.

Nye, J., in *State v. Hunter*, Lorain Co. Com. Pleas.

No. 260. Same continued—What constitutes a sale.—You are now instructed upon each of the material things which it is necessary for the state to make out before it is entitled to a verdict of guilty at your hands.

To constitute a sale the person procuring the intoxicating liquors must have paid for the same, or agreed to pay for the liquor at the time he purchased it. If you find from the evidence that the offense was committed on the evening of the — day of —, 18—, that would be sufficient so far as the

date is concerned, to warrant a conviction upon a count which charges an offense to have been committed on the — day of —, 18—, providing said offense was actually committed during the time the agricultural fair of the — County Agricultural Association was being held. This becomes a question of fact for you to determine from all the evidence in the case whether the said defendant did sell intoxicating liquors to the said C. W. on the night of the — day of —, 18—.

Nye, J., in *State v. Hunter*, Lorain Co. Com. Pleas.

No. 261. Same continued—What constitutes sale within two miles of agricultural fair.—If you find from the evidence given you in this case that the — County Agricultural Society held an agricultural fair in — County, which opened its exhibits to visitors on the morning of — day of —, 18—, and continued open from day to day, every day, until the afternoon or evening of —, 18—, except that its grounds were closed to the public during the nights, and you further find that substantially all the exhibits of said agricultural fair remained on the grounds of said — County Agricultural Society, both day and night during said period, you are instructed that the place where the said agricultural fair was thus held was, in contemplation of the statutes, a place where agricultural fair was being held, during all the time both day and night, from the time that said agricultural fair was thus opened for its exhibition to the public, from the morning of —, 18—, or afternoon or evening —, 18—; and the sale of intoxicating liquors within two miles of the place where the agricultural fair was being held would be a violation of the statute. It would, therefore, be unlawful to sell intoxicating liquors within two miles of the place where the agricultural fair was thus being held, from the time of its opening to its close.

It then becomes a question of fact for you to determine from all the evidence in the case, if you find that intoxicating liquors were sold by the defendant to said C. W. as claimed by the state, whether said sales, or either of them, were made during the time that said agricultural fair was being held.

Nye, J., in *State v. Hunter*, Lorain Co. Com. Pleas.

No. 262. Same continued—What is intoxicating liquor.—Upon the subject of intoxicating liquors you are instructed that whisky is an intoxicating liquor. If, therefore, you find, from the evidence which has been submitted to you in

this case, that the defendant sold whisky to the said C. W., the sale of whisky would be the sale of intoxicating liquors.

Nye, Judge, in *State v. Hunter*, Lorain County Common Pleas.

No. 263. Same continued—What is an agricultural fair.

—It becomes important for you to determine from the evidence given you in this case whether an agricultural fair of the — County Agricultural Society was being held at the time the alleged sales, or either of them, are said to have been made. You are instructed that “A place where industrial products of the people in agriculture, manufacture and the arts are received and placed on exhibition for the purpose of displaying them and awarding prizes as the reward for excellence, is an agricultural fair.” And one who sells intoxicating liquors within two miles of the place where the agricultural fair is being held, is liable under the state statute.

Nye J., in *State v. Hunter*, Lorain County Common Pleas.

No. 264. Sales by agent or barkeeper.—If you find from the evidence which has been given to you in this case, that there was a sale made of intoxicating liquors to said C. W. by the agent of the defendant, acting in the line of his duties, the defendant would be liable for the acts of his agent, thus acting in the line of the agent’s duty and authority. If you find from the evidence that the defendant placed some one, even temporarily, behind the bar to wait on customers, and make sales, such person so placed there would be the agent of the defendant in waiting on customers and making such sales, while thus in the employ of the defendant. If you find from the evidence that there was a person behind the bar in defendant’s place of business in the act of selling articles there kept for sale, with the knowledge of the defendant, that act may be considered by you in determining whether said person was agent of the defendant, and acting with the authority of the defendant. And if you find from the evidence that some one went into the defendant’s place of business and went behind the bar and sold intoxicating liquors without the knowledge or consent of the defendant, defendant will not be liable for any sales made by such unauthorized person. The defendant had a right to go into his saloon at any time during the agricultural fair, and there would be no liability therefor. If the defendant made no sales of intoxicating liquors, either by himself or an agent authorized in the matter, he could not be legally convicted.

Nye, J., in *State v. Hunter*, Lorain County Common Pleas.

INSURANCE—FIRE, ACCIDENT, LIFE.

No. 265. Damage for loss by fire—What must be shown to warrant recovery—Loss not within exception—Amount of loss—Proofs—Waiver.—The burden is upon the plaintiff, in order to entitle her to recover here, first, to establish by a preponderance of the evidence that this property destroyed by fire, was not excepted by any of the provisions of this policy of insurance upon which she predicates her action, and to establish the amount of her loss by reason thereof, and that within the time provided by the policy she furnished to the company or its authorized agent proofs of loss, as required by the policy, or that that provision of the policy was waived by the company or its authorized agent, or by either; or by the act of its authorized agent she was prevented from thus complying with the conditions of the policy. These are the propositions that the plaintiff must maintain to entitle her to recover, and she must maintain these propositions by a preponderance of all the testimony in the case.

Look into the testimony and conditions of this policy and ascertain whether or not the loss and damage by fire was one that was not excepted by this policy; if not, then your next inquiry will be, did she, at the time required by this policy, furnish to this company, or its authorized agent, proofs of loss such as are required by that condition of the policy; if she did not, was that provision of the policy required on her part to be complied with waived by the company or any of its authorized agents? If not, was she by the act of the company, or its authorized agents, prevented from complying with it and furnishing to the company within the specified time such proofs of loss?

No. 266. Same continued—Instructions as to waiver of conditions—By agent.—It is admitted in the pleadings and admitted in the trial that the proofs of loss were not furnished within the time specified in the policy. The plaintiff seeks to avoid the effect of failing to comply with this condition of the policy by showing that it was waived by the company, or by its agent, or that the defendant company, or its agent, prevented her by their conduct from thus furnishing proofs of loss. Now, I say to you, gentlemen, that that provision of the policy can be waived after a fire—after a loss—by the

company by its president, or officer, or any agent authorized to act for and represent it, no matter what he may be designated, whether adjuster, or solicitor, or what not, it depends upon his power to represent the company in the insurance business whether or not he has authority to waive that provision of the policy. And if the agent has general authority to make contracts of insurance, to fill out and issue policies, to collect premiums, and to represent the company in its business of prosecuting the insurance business, he has power to represent it in all matters incident thereto. And if you should find from the testimony that the agent, S., had authority to represent the company here in the transaction of its business as an insurance company, the procuring of insurance, the filling out and issuing of policies, making contracts of insurance, and the collection and handling of its moneys, he had power to represent the company in waiving the provisions of the contract thus made by him. The burden of establishing this authority of this agent is upon the plaintiff, and if you should find he was thus authorized, then you will look into the testimony and determine whether or not he did waive the performance of this provision of this contract within the fifteen days. If he did not do it by express terms, did he by his act and conduct lead the plaintiff to understand, by what he said and by what he did, that a strict compliance with that provision of this policy was waived and would not be insisted upon? Or did the adjuster, having authority to adjust and settle these losses, lead her by his conduct and declarations to understand that a strict performance of that provision of the policy would not be required?

From *United Fireman's Ins. Co. v. Kukral*, Supreme Ct., unreported, No. 1699 (13-161). Judgment of C. C. affirmed, 31 W. L. B., 233.

Waiver. There is a waiver if the company notify the insured that they will pay in any event. 2 C. S. C. R. 186. Investigation without waiting for proofs is a waiver. 2 Am. L. Rec. 336. Waiver may be after as well as before the time stipulated for presenting proofs. 7 C. C. 356. If an agent tells the assured, after an examination of the loss, that "nothing further is required," it is a waiver of the preliminary proofs of loss, even though there is a clause providing that no agent has power to waive any condition. *Bish v. Hawkeye Ins. Co.*, 69 Ia. 184. If an agent authorized to settle a loss induces the assured to forbear bringing suit, the company waives the limitation. *Stevens v. Citizen's Ins. Co.*, 69 Ia. 658. The requirements of a policy that proofs of loss shall be given as soon as possible, may be waived by the insurer's conduct and negotiations. *Dohn v. Farmer's Joint Stock Ins. Co.*, 6 Lansing, 275. Evidence that the person who solicited insurance used language to the insured which might have induced him to postpone making and forwarding the proofs within the time limited, was evidence to sustain a waiver of the condition. *Norton v. Rensselaer Ins. Co.*, 7 Cow. 645. The adjuster may waive proofs. *Ætna Ins. Co. v. Shryer et al.*, 85 Ind. 362. The adjuster may waive; and if he places the refusal to pay loss wholly upon other grounds, it is a waiver of the right to defend a suit on the ground that such proofs were not made.

Eggleston v. The Council Bluff Ins. Co., 65 Ia. 308. The company may waive proofs, and proofs may then be made in the prescribed time after the waiver, where it is shown that the insured, without any fault or fraud on his part, is unable to procure certain of the proofs of loss required by the policy of insurance, he may recover without a literal compliance with the proofs of the policy in this respect, for the law will not require an impossible thing. As to waiver by act of agent in furnishing blanks for proofs, see 88 Pa. St. 230, 13 Phila. 551. The fire insurance company received and retained proofs of loss without objection, and they were twice asked in writing to inform the insured if it wished for any further statement made; no reply. Held, that the insurance company waived the defense. *Grange Mill Co. v. Western Ins. Co.*, 118 Ill. 396; *Continental Life Ins. Co. v. Rogers*, 119 Ill. 479. Proofs of loss, or objection to the form of proof, is waived when the company bases its refusal to pay on other grounds. *Hartford Protection Ins. Co. v. Marmer*, 2 O. S. 452. Objections to the preliminary proofs will be considered as waived, if, after they are rendered, no specific objections are pointed out, and the assured is informed that his claim will be considered on the merits, and a claim is rejected, finally, upon the grounds that the company is not, in any event, liable to pay the loss. *The Globe Ins. Co. v. Boyle et al.*, 21 O. S. 130

No. 267. Notice and proof of loss—Waiver of—How made.—After reciting the substance of the conditions, proceed:

These conditions are binding upon the plaintiff, and it can not recover unless it has shown that it performed them, or has shown waiver of such performance on their part by the defendant. The notice and proof of loss must be furnished or waived, too, for sixty days, before the insured is entitled to payment or has a right to bring a suit for the same. If the insured brings suit within the sixty days, he must fail, except in the event of the company denying all liability on the policy. In the latter event an action may be commenced without waiting the time limited—sixty days.¹

Waiver of proof of loss does not make the claim due at once; the company would still be entitled to the sixty days after the waiver to investigate, and for such other purposes as it might want the time for, except as stated—it notifies the insured that it will not pay in any event. In the latter event, the condition that no action be brought within sixty days after proofs of loss is deemed waived. So also a denial of all liability, made after inquiring into the loss, on the ground that the loss is not within the policy, or that the policy is void is a waiver of the clause requiring proofs of loss.

A notice of the loss given immediately after the fire, or as soon thereafter as it can be done with reasonable diligence, to the agent of the company at the place where the fire occurred, or with such diligence causing notice of the loss to be brought to the knowledge of the company, is a sufficient compliance with the condition requiring notice of the loss to be given to the company.

¹ *Ellis v. Life Ins. Soc.*, 555 S. W. 2d 728.

"The requirement of preliminary proofs of loss is a formal condition inserted in the policy solely for the benefit of the insurer. That such proofs may be waived, in whole or in part, is well settled as a legal proposition. The waiver may be by the direct action of the insurer, or by his general agent by virtue of his authority. The waiver may be express, or it may be inferred from the denial of obligation by the insurer exclusively for other reasons."²

A waiver may be inferred from the acts and declarations of the company, or of its authorized agents acting within the scope of their employment. The adjuster, employed by the defendant to act for it in the matter, was the agent of the company, and all he did in the matter within the scope and line of his employment and duties as such adjuster were the acts of the company and binding upon it.

Mere silence on the part of the company will not amount to a waiver of proof of loss; nor would the sending of agents to make inquiry or investigation into the matter of the loss; nor would even an attempt to compromise the matter, either or all of them, in themselves amount to a waiver of proofs of loss, provided nothing was done while so engaged that would cause a man of ordinary judgment and discretion to believe that formal proofs of loss were waived. But if such agent or agents, while so engaged, act in the matter so as to cause the insured to believe that proofs of loss are waived, and their acts are such as would have caused a man of ordinary discretion and judgment to so believe, and the insured, by reason thereof, refrain from making such proof, such acts will amount to a waiver of such proof. If the company, by its adjuster or agent, proceeds to investigate the matter of the loss on its merits, and by what it does causes the insured to believe, and a man of ordinary judgment under the circumstances would have so believed, that it is only the amount of the loss that is in dispute, and nothing else, between the parties, that will amount to a waiver of proofs of loss. So, as said, an absolute refusal to pay on the merits of the claim or a denial of liability to pay in any event will amount to a waiver. The company must not by its acts, or by the acts of its agents acting within the line of their duties and authority as such agents, do anything that will throw the insured off his guard and cause him to believe that proofs of loss are not wanted by the company. If such acts are such as would cause a man of ordinary judgment and discretion to so believe in like circumstances, and the insured so believed and acted

² *Ins. Co. v. Parisot*, 35 O. S. 40-41.

on such belief, the company will be held to have waived such proofs.

And if the company waived such proofs, it can not afterwards recall or reclaim such waiver, and demand or insist upon such proofs. If once waived, the company can not afterwards insist upon the performance of the condition requiring such proof.

From the fact, if a fact, that the company sent an agent to the place of the loss to make investigation in regard to the same, and from what the evidence may show, if anything, he did about making such investigation; from the fact, if a fact, that the company sent an adjuster to adjust such loss, and from all such adjuster did in regard to the matter; from the fact that the plaintiff and defendants, on April 22, 1889, pursuant to the condition in the policy—set out in printed matter in the third defense as amended—selected two persons to appraise and estimate at the true cash value the damage by fire to such of said property covered by the policy as might be found in a damaged condition, as alleged in said defense; the fact of such appraisal being made and reported by such appraisers; the fact, if a fact, that D. and such adjuster agreed upon the loss upon other of the property covered by the policy; from what the evidence shows was done and passed between said adjuster and D. while about the matter of attempting to adjust such loss, altogether, from all these and from all circumstances disclosed by the evidence, you will determine whether or not the company waived proof of loss, the burden of proving such waiver by a preponderance of the evidence being upon the plaintiff. If so waived sixty days before suit brought, the plaintiff is entitled to a verdict if it has otherwise made out its case. If such waiver was made within sixty days before the suit was brought, the plaintiff can not recover, unless the plaintiff proves that there was an absolute refusal by the company to pay in any event.³

³ Wm. E. Evans, Judge, in *Germania Fire Insurance Co. v. Dun & Co.*, Supreme Court, judgments affirmed, charge approved.

No. 268. Proof of loss—Failure to strictly comply with conditions as to—By reason of destruction of policy—Duty of agent to furnish necessary information on application.— If the testimony satisfies you that the policy of insurance was destroyed by fire, and she did not have it in her power to furnish a written description, or copy of the written portion of the policy, and did not have within herself the specific directions that the policy required to be complied with in that respect, and she applied to the agent of this company for

the information, or for a copy of the policy thus to enable her to fulfill that condition of the policy, it was the duty of that agent, and the duty of the company, to furnish her with that information thus possessed by them and not possessed by her, and the refusal on their part to furnish her with that information, if a compliance on their part at the time she asked for it would have enabled her to furnish proof of loss within the time required by the policy, and she was not, by reason of that refusal, able to furnish proofs of loss thus required, that would be an act upon their part which would prevent her from furnishing her proofs of loss, and would estop them from setting up that defense. The rule in regard to estoppel is in substance as alleged here, and the rule in regard to waiver is simply honesty and fair dealing between the parties; what has the plaintiff a right to believe and fairly consider under all the circumstances of what was said and what was done—what had she a right to fairly believe and act upon under these circumstances?

From *United Fireman's Ins. Co. v. Kukral*, Supreme Court, unreported, No. 1699 (13-161), judgment of C. C. affirmed, 31 W. L. B. 233.

No. 269. Burden of proof in action for loss by fire—Proofs of loss, etc.—The burden of proof of the material allegations of the plaintiff's petition that are denied by the answer is upon the plaintiff; that is to say, it being admitted, as I have told you, that the policy was issued, the date, the amount of insurance, the property covered, the occurrence of the fire, and that in payment of the loss or damage there made, it then devolves upon the plaintiff to satisfy the jury by a preponderance of the evidence that notice of such fire was given by the insurer immediately after the occurrence, and that, as soon thereafter as possible for the plaintiff to do so, the plaintiff made out and furnished to the defendants proofs of loss as required by the policy you have in force.

The fact, if such you find to be the fact, that the proofs of loss were made by the plaintiff to defendant company, as provided by the terms of the policy, does not relieve the plaintiff in the action from the burden of proof by a preponderance of the evidence of the *amount* of the loss or damage sustained by the fire to the property insured. The proofs of loss, if you find that any were made, are simply evidence for the insured of compliance with the conditions of the policy requiring them, but not of the facts contained in the proofs of loss. Therefore it devolves upon the plaintiff to satisfy the jury by a preponderance of the evidence of the amount of loss or damage by reason of the fire to the said

property insured, and which loss or damage the policy provides shall be based upon the actual cash value of the property at the time of such fire. If the plaintiff has by a preponderance of the evidence satisfied the jury upon these points, then the plaintiff will be entitled to recover in such sum as the jury shall find from the evidence to be the amount of such loss or damage caused by the fire, unless the jury find by a preponderance of the evidence the existence of certain other facts, or any of them, as claimed and alleged by the defendant in his answer, and of which testimony has been offered tending to prove.

Melhorn, J., in *Carnahan v. Penn Fire Insurance Co.* Hancock County Common Pleas.

No. 270. Insurance of partnership property—Question whether partnership was dissolved at time insurance issued—Representation as to ownership of property.—In order to recover in this action the plaintiff must prove by a preponderance of the evidence that said D. & Co. was a partnership doing business in Ohio as alleged; and that, at the time the policy of insurance was issued and at the time the property described therein was injured or destroyed by fire, such property was owned by said partnership; that said property was injured or destroyed by fire as claimed, and the amount of such injury or loss; and that the plaintiff performed all the conditions of said policy on its part, or that the defendant waived such of the conditions as were not performed by it sixty days before bringing this action; that such of said conditions as by the terms of the policy were required to be performed sixty days before suit brought were performed, or the performance thereof was waived by the defendant sixty days before the suit was brought.

The policy of insurance is the contract between the parties. The indorsement upon or attached to it, specifying how much of said \$5,000, the amount named, is upon specified classes of said property, is a part of the policy. Both parties are bound by and have a right to insist upon the performance of all the terms and conditions of the contract of insurance—the plaintiff as much as the defendant, and the defendant as much as the plaintiff, and either as much as an individual might do under like circumstances.

(a) *The plaintiff must have been, as alleged, a partnership doing business in Ohio, and the owner of the said property.* If, at the time the policy of insurance was issued, the firm or partnership of D. & Co. had been dissolved and was not in existence, then the representation that the property was the

property of D. & Co. would avoid the policy, and the plaintiff can not recover; If it had not been dissolved before the policy was issued, or before the fire, if it was an existing partnership, and the owner of the goods, it can recover, if it has in other respects made out its case under the instructions. If D. & Co. was a partnership for the purpose only of carrying on a banking business, the fact, if a fact, that D. purchased the goods for the firm of D. & Co. in consideration for and in satisfaction of a judgment in favor of D. & Co. against the then owner thereof, without consulting C. or getting his consent thereto, did it in good faith, thinking it for the best interest of D. & Co. to do so; and the further fact, if a fact, that he, thinking it for the best interest of D. & Co. to do so, kept the store, of which the goods in question constituted the stock, open as a going concern and sold goods therefrom for a time, will constitute no defense for the defendant in this action.

Wm. E. Evans, J., in *Germania Fire Insurance Co. v. Dun & Co.*, Supreme Court, judgments affirmed, Fayette County.

No. 271. Vacancy of Property — Breach of condition as to.—There is a provision connected with the clause which reads: "Shall become vacant and unoccupied without the written assent of the company indorsed thereon." The defendant says that this property became vacant and unoccupied, and that it was destroyed by fire while in that condition, and that that condition was not with the assent of the company written or indorsed upon the policy. In order to forfeit this policy under this clause, it is necessary that the premises in question should be both vacant and unoccupied. There seems to be a distinction drawn between occupancy and vacancy of premises,¹ but the language of this policy is such, being connected with the conjunction, and, that both occupancy and vacancy must exist, or a want of occupancy and a vacancy of the premises must exist in order to enable the defendant to avail itself of this provision of the contract. If no person is living in the building—in the premises—sleeping there, lodging there, occupying it in the usual way of a dwelling-house being occupied by persons, then it is unoccupied within the meaning of this clause of the policy. And the having of a few articles of furniture, whether it be carpets or anything else in the house, is not such an occupancy or use of the premises as would render it not a vacant house or unoccupied dwelling-house. Therefore, if you find under the proof in this case that at the time this policy was issued it was occupied by a tenant of M. R., and that subse-

¹ *Moody v. Insurance Company*, 52 O. S. 12.

quently that tenant moved away from the premises, and after the tenant was gone, M. R., with a view to a future occupancy of the premises by herself, commenced making preparations for such occupancy by placing in the building a carpet or two carpets, and a chair or two, that would not relieve the plaintiff or M. R. from the force and effect of this provision of the contract, providing the fire which destroyed or injured the premises occurred before anyone actually moved into the premises, or so placed therein furniture and goods that it could not be said to be vacant.² The mere intention of a party to move into premises is not an occupancy in fact of those premises. The intention to move the necessary articles for housekeeping into the premises does not constitute such an occupancy of the building by furniture and goods as to relieve it from the charge of being vacant. If you find that there was in the building at the time of the fire substantial articles and furniture for housekeeping by a family or by one or two persons, the place would not be vacant within the meaning of this provision of the policy. But if only a portion, simply an article like a carpet or two carpets, or a chair or so was in there, if that is all or substantially all there was of it, the plans simply consisting of an intention to put other articles therein in the future and to go there and occupy the building, that would not be such an occupancy of the premises as to relieve the plaintiff from the obligations of this provision of the contract, nor would it deprive, in other words, the defendant from availing itself of this provision of the contract in case any fire occurred while the premises were in this situation and condition.³

² Cf. *State v. Tuttingerding*, 5 W. L. B. 464. A tenant's removal permanently renders premises vacant. 42 O. S. 519. Leaving furniture all in house ready for use is not leaving it vacant. 52 O. S. 12.

³ From *Hanover Fire Insurance Company v. Citizens' Savings and Loan Association*. Supreme Court, unreported, No. 1562. Judgments of C. C. and C. P.; affirmed; 27 W. L. B. 216. Charge approved.

No. 272. When is a building vacant or unoccupied.—What constitutes vacancy or nonoccupancy of a building is a question of law; but whether a building is vacant or unoccupied or not, within the meaning of the law, is a question of fact for the jury.¹

To constitute occupancy of a dwelling-house, it is not essential that it be continuously used by a family. The family may be absent from it for health, pleasure, business or convenience for reasonable periods, and the house will not, on that account, be considered as vacant or unoccupied. Under a policy which declares that no liability shall exist

¹ *Moody v. Insurance Company*, 52 O. S. 12.

under it for loss or damage to an unoccupied building, but does not stipulate that the insured building shall be used as a dwelling, or require any particular mode of occupancy. Strictly construed, occupancy for any lawful purpose would satisfy the condition and preserve the obligation of the policy. It is not in any event essential that the building be put to all the uses ordinarily made of a dwelling, or to some of those uses all the time; nor that the whole house should be subjected to that use. Nor is a dwelling-house considered as unoccupied merely because it has ceased to be used as a family residence where the household goods remain ready for use and it continues to be occupied by one or more members of the family, who have access to the whole building for the purpose of caring for it, and who do care for it and make some use of it as a place of abode.²

² *Moody v. Insurance Company*, 52 O. S. 12; *Insurance Company v. Kiernan*, 83 Ky. 468; *Richards on Insurance*, Sec. 56; *May on Insurance*, Sec. 247.

No. 273. Vacancy—Waiver of forfeiture by reason of vacancy of premises—Burden of proof.—If you find, gentlemen of the jury, that these premises were in fact vacant and unoccupied, and Mrs. R., or anyone representing her, gave notice to the duly authorized agent of the defendant of that fact, and you find that the agent upon receiving that notice said "all right," or words to that effect, "that he would be over and see her," that would constitute a waiver of this provision of the policy forfeiting the same by reason of a vacancy and unoccupancy of the premises; in other words, it was within the power of the company to waive this provision of the policy—of its contract, and this waiver could be made by an agent of the company—could waive the enforcement of that provision of the policy, could waive its endorsement thereon, or the assent of the company endorsed thereon, and if you find from the testimony that such was the case before this fire and after this policy was issued and before the fire occurred, that notice was given in this way to the agent and he made the reply "all right," that he would be over and see about it, and the fire occurred after the notice was given and before he came to see about it, it would be a waiver of that provision of the policy and would not interfere with the right of the plaintiff to recover in this action.

On the question of the preponderance of the evidence I will say to you that the burden does rest upon the plaintiff to show the waiver. If you find that this property was vacant and unoccupied, and the fire occurred during that

vacancy and unoccupancy of the building, if it is claimed a waiver of that provision was made, the burden of proof to show that waiver rests upon the plaintiff; and I will also say in this connection the burden of proof rests upon the defendant to show, and it must satisfy you by a preponderance of the evidence that this building was vacant and unoccupied at the time of the fire.

From *Hanover Fire Ins. Co. v. Citizens Savings and Loan Assoc'n*, Supreme Court, unreported, No. 1552 (12—741); judgment of C. C. and C. P. affirmed, 27 W. L. B. 216, charge approved.

No. 274. Total or partial loss.—It is a question of fact for you to find from the evidence whether this was a total loss by the owner of this property, or whether it was only partial. If you find from the evidence that it was a total loss, and further find such a state of facts as prevented the defendant from availing himself of this clause of the forfeiture to which I have called your attention, or, in other words, find that it was not vacant and unoccupied when the fire took place—I say if the premises were not vacant and unoccupied, and the loss was a total loss, and no fraud was perpetrated in procuring this insurance, and no act had been done to increase the risk after the policy was issued, this plaintiff would have the right to recover the full amount named in this policy, \$———. If, however, you find that it was a partial loss only, then the plaintiff would be entitled to recover only the full value of the loss actually sustained to the building, whatever the proof may show you that loss to have been. To make this more clear, I will repeat it. If you find that the building was totally destroyed, or rather a total loss by reason of this fire, and that the policy was procured without fraud, and nothing had been done with the premises after the issuing of the policy to increase the risk, and the premises were not vacant and unoccupied at the time of the loss, the plaintiff would be entitled to recover the full amount of the policy, which is claimed to be \$———. But if you find that the loss was a partial loss and not a total loss, then the recovery would be simply the actual damage done to the property by the fire.

From *Hanover Fire Ins. Co. v. Citizens Savings and Loan Assoc'n*, Supreme Court, unreported, No. 1552; judgments of C. C. and C. P. affirmed, 27 W. L. B. 216, charge approved.

No. 275. Compromise of loss obtained under duress.—The court now says to you, as a matter of law, that if you find there was a contract of compromise, and if the only consideration that entered into that contract of compromise was

simply the settlement and adjustment of the claim in dispute between them, then that, in this case, under this evidence, this plaintiff can not recover, provided you find there was such a contract of compromise. But the court further says to you that if you find there was such a contract of compromise made, and if any part of that contract or compromise was an agreement not to prosecute this plaintiff upon the charge of burning her own property, then I say to you such a contract of compromise was void and is of no force and effect as a defense in this case. But, as I said before, if it was no part of the consideration of the contract or compromise that they agreed not to prosecute her for the charged crime of arson, then I say to you the plaintiff can not recover under the evidence and law as applied in this case.

No. 276. Evidence as to value of property as reflecting on charge of destroying property.—Evidence has been offered in this case touching upon the value of the property insured, and it is maintained by the defendant that the evidence shows that all the property, including the land upon which the buildings were situated, were not of the value for which this property was insured; on the other hand the plaintiff maintains that the property was of greater value. This evidence was offered and bears upon the motives of the plaintiff, whether or not it would be to his interest to have this property destroyed and thus reap a benefit by the insurance, and therefore it is admitted for the purpose of showing what, if any, motives the plaintiff could have had for destroying this property; would it be to the interest of this plaintiff so to do.

Gillmer, J., in *Hickox v. Ins. Co.*, Trumbull County Common Pleas.

No. 277. Cancellation of policy.—You are instructed that it was competent for the plaintiff and the defendant by its agent to surrender and cancel said policy or contract of insurance at any time between the date of the said policy and the date of the said loss or fire. And if you find from the evidence that the plaintiff and the defendant by its agent did agree to surrender and cancel said contract of insurance at any time between the issuance of the policy and the date of the fire, then the defendant would not be liable for any loss accruing after the surrender or cancellation of said contract policy of insurance. And before you can find that such policy or contract of insurance was surrendered by the plaintiff to the defendant by the mutual consent of the parties, you must find that the minds of the parties met, and that the plaintiff and defendant undertook to and did make an agreement to

surrender the policy with the understanding that the same was to be canceled and of no binding force or effect thereafter.

In determining whether there was a cancellation by the mutual consent of the parties, you should look into and determine from the evidence whether it was the intention and understanding of the parties at the time the policy was delivered by the plaintiff to the agent of the company that the same was to be canceled and surrendered and of no force and effect. Look into and determine what was said and done between them, their conduct in relation thereto, and from it determine whether there was at that time an intention on the part of the plaintiff and the defendant that the contract was then surrendered and canceled and of no further binding force.

The defendant had a right by the terms of the policy of giving the plaintiff five days' notice of its intention so to do before canceling said policy without the consent of the parties; and if you find the defendant did cancel the policy after giving the plaintiff five days' notice of its intention so to do, then such policy would not be in force and the plaintiff would not be entitled to recover herein. But before the defendant could cancel the policy under the provisions thereof it must give the plaintiff five days' notice of its intention so to do, and must have returned to the plaintiff the unearned premium thereon, unless there was some waiver of the notice so required and of the return of said unearned premium.

The plaintiff had the right to waive the five days' notice, but whether he did so is a question of fact for you to determine. . . . It is not necessary to put a written cancellation upon the policy in order to complete its cancellation. The cancellation of the policy might be made without placing any writing thereon.

Nye, J., in *Leonard v. Queen Ins. Co.*

No. 278. Recission—Necessary party to suit for.—"If each policy was respectively made out on the application of a person other than plaintiff, and was made payable to such person, then such person is a necessary party to the surrender, release, or recission of the policy issued to him or her, and if it be further found that the policy was not surrendered, released, or rescinded by such party, but continued in force and binding on the company, then the plaintiff can not recover."

From *Insurance Co. v. Rodgers*, 33 O. S. 533.

No. 279. Insurance—Fire—Defense—False representations as to value of property—Burden of proof as to.—It may be a difficult matter to formulate a charge that will answer in all cases where there are false representations made to procure insurance, but the following is a case of frequent occurrence and is therefore given as found in the judge's charge from which it is taken.

“As a ground of defense it is alleged by the defendant that the plaintiff, in order to obtain the insurance from the defendant company and other companies, to induce the defendant company to issue the policy sued on, and to take the risk equal to ——— part of the item described in the policy, falsely and fraudulently represented to the defendant that the plaintiff kept in his store building an average stock of merchandise to the value of \$———, and kept and carried store furniture and fixtures to the cash value of \$———, and the cash value of the property in the store building was more than \$———. The defendant avers that these representations were false, that the plaintiffs at the time they were made knew them to be false, and that they were made for the purpose of procuring an excessive insurance, and for the purpose of defrauding the insurance companies, including the defendant company. The defendant says that the real value of the property at the time the policy was issued and at all times thereafter did not exceed \$———, which the plaintiff well knew, and the defendant did not know, but that the defendant, relying upon the representations and believing them to be true, was thereby induced to issue the policy which he otherwise would not have done. . . . To establish this defense claimed by the defendant the burden of proof is upon the defendant. It must satisfy you by a preponderance of the evidence that the plaintiff did make these representations alleged; that they were false, and that the plaintiff at the time they were made knew them to be false, that the defendant did not know that they were false, and that they were made to induce the defendant to issue the policy, and, if the defendant did so satisfy you, the plaintiff can not recover and your verdict should be for the defendant. But if you find that the plaintiff did not make such representations, or, if made, that they were true and not false or fraudulent, then this defense fails. If you find from the evidence that the defendant concurred with his co-insurers on the property insured and fixed the value of the insurance as claimed by the plaintiff, the defendant can not, under these circumstances and in the absence of any fraud on the plaintiff's part, com-

plain of the value so fixed on the said property in so far as claiming fraud on the plaintiff's part in this respect.

Melhorn, J., in *Carnahan v. Penn Fire Insurance Co.*, Hancock County Common Pleas. As to overvaluation, see 6 O. C. C. 1.

No. 280. Defense—When fraudulent concealments or misrepresentations were made.—The facts in the case from which the following instructions are taken appear in many such actions about as follows:

“That the policy provided that if the party insured concealed or misrepresented, either in writing or otherwise, any material fact or circumstances concerning the insurance, or in case of any fraud or false swearing by the insured, touching any matter relating to the insurance, whether before or after the loss, it should be void, and also that as soon as possible after the fire the party insured should render a particular account, proved, signed, and sworn to by the insured, stating his knowledge and belief as to the origin of the fire, also the full value of the property covered by the policy at the time and immediately preceding the loss, and the amount of loss or damage sustained. It was charged in this case that a false statement was made by the plaintiff, and that the plaintiff falsely swore to the statement, and that the provisions of the policy were therefore violated.

You are instructed that in order to constitute a valid defense under the condition of the policy, and in relation to the concealment and misrepresentations, or fraud, or false swearing by the insured, it must appear from the evidence that it was in relation to some material fact or circumstances concerning the insurance, and that it was done by the plaintiff firm, or by its members, or either of them, willfully or knowingly, and that it was the intention to deceive and defraud the officers and agents of the defendant company. If you find from a preponderance of the evidence that the plaintiff firm by its members, or either of them, by concealing or misrepresenting or falsely swearing touching any material fact or circumstances concerning this insurance, as claimed by the defendant, this in law would be such fraud upon the defendant as would render the policy void.

Fraud and false swearing, in order to prevent recovery, must be intentional with the parties defrauding, and it may be with reference to any material matter concerning the insurance, it may be by overvaluing the loss, or by undervaluing what they have, or it may be swearing to a loss of property which was not in existence, and in many other ways. If the insured, with reference to the quantity and value of

the goods insured, made a claim which he knew to be false, and to defraud the defendant, he can not recover anything. If you find then from the preponderance of the evidence that the allegations contained in this defense are true, then the plaintiff can not recover and your verdict should be for the defendant.”

} Melhorn, J., in *Carnahan v. Penn Fire Insurance Co.*, Hancock County
' Common Pleas.

} Doctrine of concealment applies to fire insurance. The insured must not misrepresent or designedly conceal, unless the fact is of unusual peril, and not discoverable by the insurer. *Ins. Co. v. Harmer*, 2 O. S. 452; *Ins. Co. v. Ins. Co.*, 5 O. S. 450. The materiality of the fact concealed is for the jury. 2 O. S. 452.

No. 281. Insurance—Fire—False representations as to other insurance.—The false representations material to the risk that would avoid the policy must be to some existing fact affecting the property insured at the time the risk was taken, or during the existence of the policy. And we say to you that any substantial representation as to the fact whether the property to be insured was or was not insured, and was or was not covered by other valid subsisting insurance, would be material to the risk, and any substantial misrepresentations in these respects, intentionally or fraudulently made by the plaintiff to the agent to induce him to issue a policy, and if the policy was issued by reason of such misrepresentations, the defendant, relying thereon and not knowing them to be false, would avoid the policy.

When verbal representations are made material to the risk, it is not sufficient that they be false to avoid the policy; it must appear that they are both false and fraudulent to have that effect. If they were honestly made, though they may be untrue in fact, the policy is not thereby rendered void. But material representations made by plaintiff to the agent issuing the policy, which she assumed to be within her personal knowledge, or which she made recklessly, not knowing them to be true, are false and fraudulent in the legal sense, if made with an intent to deceive the insurer, if they were untrue in fact, and were relied upon by the insurer in absence of knowledge to the contrary upon his part in taking the risk, although the plaintiff did not know them to be false.

If nothing was said before the making and delivery of policy by either party as to encumbrances or rather insurance on the property insured, the company will be presumed to have waived these conditions of the policy, if the insured acted in good faith.¹

¹ A clause prorating recovery in case of other insurance is not an assent to obtaining other insurance. 28 O. S. 69. Such condition is waived if the interrogatory in the application is left unanswered. 24 O. S. 345.

(a) Good faith of plaintiff.

As bearing upon good faith of plaintiff the value of the property insured has been permitted to remain before you, but unless you find from a preponderance of the evidence that the plaintiff was guilty of intentional fraud in respect to the matter wherewith she is charged with fraud in the defendant's answer, it can not be used by you to reduce the amount of recovery below the amount for which the dwelling-house was insured, if you find the plaintiff entitled to recover.

If you should find from a preponderance of the evidence that the plaintiff was so guilty of intentional fraud as herein defined and set up in the answer to the charge of insurance or mortgage incumbrance, then she can not recover for any loss to her house.

If you should find against the plaintiff upon the insurance upon the dwelling-house, if you should find that the risk was taken at the solicitation of the agent and not of the plaintiff, and that she made no intentional fraudulent misrepresentations respecting the household furniture and other personal property covered by the policy, you may find for her for the value of such personal property, not exceeding \$——, as you find from the evidence was covered by the policy and was destroyed by the fire, with interest thereon from ——.²

² Voris, J., *France v. Norwich Union Fire Insurance Co.*, Summit County Common Pleas.

No. 282. Same continued—Return of premium.—If you find that the plaintiff was guilty of intentional fraud as herein limited and defined (*Ante* No. 281), the defendant need not offer to return the premium paid on this policy for interest on its invalidity because of the fraud set up in its answer.

Voris, J., in *France v. Norwich Union Fire Assoc'n*, Summit County Common Pleas.

No. 283. Fraudulent proofs of loss.—"The jury are instructed that if they believe from the evidence that the policy sued on contained a provision that all fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claims under the policy, and that, if they further believe from the evidence that plaintiffs have fraudulently offered to defendant proofs of loss under the policy, containing material statements in regard to the loss under said policy, which the plaintiffs knew to be false at the time the same were offered, you will find for the defendant."

From *Shulter v. Ins. Co.*, 62 Mo. 237.

No. 284. Insurance—Fire — Ownership of property.—

The defendant claims that the policy of insurance issued upon in this case was void and never took effect because the plaintiff at the time the policy was issued was not the owner of the property insured. You are instructed therefore that if the owner had no insurable interest in the property, no interest therein at the time the policy was issued, the policy would be void. But if you find from the evidence that he had an insurable interest in the property, the policy would not be void, unless you further find that the plaintiff, at the time he procured said policy, falsely and fraudulently represented his interest therein to the agent of the company. And if you find from the evidence that at the time the policy was issued the plaintiff had the legal title to the property and was in possession thereof, the mere fact that a man of some other name claimed an interest therein would not of itself vitiate the policy.

If you find that the plaintiff at the date of the policy was the absolute owner of the property, then he would have an insurable interest therein. And if the plaintiff at the date of the policy had a legal title to the property and was the owner thereof, but that he was under obligations to account to some other persons for a portion of the proceeds thereof, he would still have an insurable interest therein.

But unless you find from the evidence that he falsely represented to the agent of the defendant company at the time of the issuing of said policy the true nature of his title and interest therein, said policy would not be void.

Nye, J., in *Leonard v. Queen Ins. Co.*

No. 285. Insurance—Fire—Defense as to provision requiring the production of books for examination.—The following instructions may cover the usual provisions in policies touching the matter of the production of books for the examination.

The burden of proof upon this issue is upon the defendant, and unless it satisfies you by a preponderance of the evidence that what it alleges as to the production of books and vouchers in this matter on the part of the insured, as required by the policy, is true, this defense is not maintained. It was the duty of the plaintiff to comply with this provision of the policy and produce for examination its books, accounts, invoices, which it then had, upon the request of the defendant. But only such books and other vouchers as were reasonably in the power of the insured to furnish need be furnished. If you find from the evidence that the plaintiff did this, and he

was ready and willing so to do, it would be a compliance on his part with this provision of the policy.

If, however, you should find that the plaintiff, having books of account and other vouchers, refused to furnish them or permit their inspection at a reasonable time and place, or if you find that books of account, bills, and other vouchers, or any of them, were by the plaintiff fraudulently kept from the defendant for the purpose of rendering it impossible for the defendant to determine the amount of stock and loss, then the plaintiff can not recover.

Melhorn, J., in *Carnahan v. Fire Insurance Co.*, Hancock County Common Pleas.

No. 286. Insurance—Fire—Defense—That large quantities of oil and petroleum were stored, and drawn at night in violation of the policy.—After reciting the facts as to the provisions of the policy, the position of the parties as shown by their pleadings, it may then be charged as follows:

The burden of proof to establish this defense is upon the defendant, and if you find by a preponderance of the evidence that the plaintiff, shortly before the fire, caused to be carried into the building in which the insured property was kept a large quantity of coal-oil or petroleum, which was not used, and which was not intended to be used for lighting the store, or for sale therein, and was not kept for either purpose, as provided in the policy, and that the oil was drawn from the barrel in which it was kept and stored in the night time and not by daylight, by the direction or with the knowledge of the plaintiff, this would invalidate the policy, unless the storing of such oil as it appears from the evidence was brought to the defendant's knowledge, and the companies consented to such storing of oil in the building. If the jury find from the evidence that coal-oil or petroleum was brought into the store by the plaintiff, or by one of its members, for the purpose of defrauding the defendant, and for the purpose of increasing any loss or damage that might accrue to said property by fire, and that by act or procurement of the plaintiff firm, or one of its members, the oil was put upon the floor of the building containing the insured property, or upon the goods, or both, and that by igniting or burning, caused a large part of the damage or loss which accrued from the fire, if you find such to be the fact, the plaintiff can not recover. It must affirmatively appear that, if any such act as this was done, it was done by the plaintiff firm, either by one or both of its members, or by some one with the knowledge and direction of the members of the plaintiff firm, or either of them, and unless

it does so appear the plaintiff can not be held responsible for such act, and the plaintiff's right to recover would not be lost by reason thereof.

Melhorn, J., in *Carnahan v. Penn Fire Insurance Co.*, Hancock County Common Pleas.

No. 287. Insurance — Fire — Defense — That fire was caused by willful act of procurement.—After reciting the charge as made by the pleadings and the position of the plaintiff thereon that the fire was caused by the willful act or procurement by the plaintiff, the instruction may proceed as follows:

To establish the truth of this charge the burden of proof is on the defendant.

The rule that applies to criminal acts when the party is charged with the unlawful act of burning property that the jury must be satisfied beyond a reasonable doubt of the truth of the charge does not apply in civil cases. The jury are permitted to find for or against the respective parties in the action by a preponderance of the evidence. The defendant must satisfy you by a preponderance of the evidence that the allegations contained in its answer upon this ground of defense are true, and unless this is done you can not find in favor of the defendant upon this issue.

Melhorn, J., in *Carnahan v. Penn Fire Insurance Co.*, Hancock County Common Pleas.

No. 288. Insurance—Steamboat—Negligence of owner's agent—Seaworthiness of boat.—"If she was in a seaworthy condition, and sufficiently manned for such a boat so lying up, and the loss was occasioned by the mere negligence and want of proper care of her watchman and those having the care of her, the plaintiff will be entitled to recover, if he has proven all other necessary facts, for such negligence is a peril insured against. But if the negligence consisted in allowing the boat to become unseaworthy, and she was lost thereby, there can be no recovery.

"The boat need not have been sufficiently seaworthy to perform a voyage, but it must have been for her preservation under all ordinary circumstances while tied up during such period of non-user, and if she encountered a peril insured against which she would have safely resisted if seaworthy, but in consequence of being unseaworthy was sunk by encountering a peril insured against, then the plaintiff can not recover.

"And further, if the boat was seaworthy when laid up,

but thereafter her seams were suffered to become open by exposure, which the plaintiff failed to have properly caulked, and she was not in a safe and seaworthy condition requisite for her safety when tied up, then the plaintiff can not recover.

“The boat must have been kept in such condition as to be reasonably sufficient to withstand the ordinary perils attending a boat so laid up at that time and place. If she was not so kept, the plaintiff can not recover, no matter what peril she may have encountered. If she was, and encountered wind or waves by which she broke her spars, was driven against the bank, and careened so as to be thrown on her side in such a way as to take in water at her seams which were far enough above the water-line so as not to endanger her safety while lying up under ordinary circumstances, and sunk in consequence thereof, then the plaintiff can recover, if he had provided and kept at the boat a force of men sufficient to take care of the boat under ordinary perils, whether all such men were directly in his employ and pay or not.”

From *Insurance Co. v. Parisot*, 35 O. S. 35.

No. 289. Insurance—Accident—Proof of claim.—The case from which the following instruction was taken alleged that immediately after the accident and death due proof and proper notice thereof, together with full name and address of the insured, was given to the defendant. That on a certain day named, due and affirmative proof of death, resulting from external, violent, and accidental means, was furnished to the defendant.

If you find from the evidence that blank forms were provided by the company for plaintiff, and the same were filled out, sworn to before a notary public by plaintiff and others, and transmitted to H., state agent for the company, by mail, and the same were received by the company, and thereupon the company in reply thereto notified the plaintiff by the letter, “exhibit A,” that her claim under accident policy No. —, written by this company on the life of G. S., has been disallowed, you may treat the condition of the policy as a proof of death of the insured, as having been complied with on the part of the plaintiff, or that the defendant waived further proofs of death.

Voris, J., in Worster v. Travellers' Ins. Co., Summit County Common Pleas.

No. 290. Insurance—Accident—What necessary to enable recovery for death upon.—To enable the plaintiff to recover, it must appear from a preponderance of the evidence

that the death of the insured resulted from bodily injuries, occurring during the term of the insurance, through external, violent, and accidental means independent of all other causes, and that his death resulted from such injuries alone within ninety days.

The burden is upon the plaintiff to establish by such preponderance of the evidence that his death resulted from such injuries, and that she made other allegations in the petition controverted by the defendant's answer.

If the alleged fall was the proximate cause of his death, though he may have had internal disease or bodily infirmity at the time of such fall, but from which he would not have died but for the injuries resulting from the alleged fall, so that you can say that his death did not result wholly or partly, directly or indirectly, from disease or bodily infirmity other than that resulting from the injury, then the fact that he had such disease or bodily infirmity at the time of the alleged injuries would not be sufficient to defeat his right to recover.

By proximate cause is meant a cause from which the death of the insured, in the natural and ordinary course of events, would be likely to follow; but if the death did result wholly or partially, directly or indirectly, from disease or bodily infirmity existing at the time of the fall, so that you can say from the evidence that such disease or bodily infirmity was the proximate cause of his death, she can not recover.

Voris, J., in *Worstler v. Travellers' Ins. Co.*, Summit County Common Pleas.

No. 291. Consideration — Adequacy or sufficiency not inquired into.—Was this a sufficient or adequate consideration for the assignment from J. L. to plaintiffs? While it is necessary that the consideration for the assignment be of some value, yet the law will not enter into an inquiry as to the adequacy or sufficiency of the consideration for the assignment, but will leave the parties to be the sole judges of the benefits to be derived from this contract, unless the inadequacy or insufficiency of consideration is so great as of itself to prove fraud or imposition.

Horace L. Smith, Judge, in *Sabin v. Corcoran*, 52 O. S. 636. See *Judy v. Louderman*, 48 O. S. 562.

No. 292. Insurance—Application for—Statements, how treated.—The plaintiff (widow) is bound by the policy and statements made by her husband, Dr. M. O'H., which are a part of the contract. The application and statements therein are warranties, and are binding on her as if made by

her, if by its terms the application did warrant. The insurance company had a right to make such application to be a part of the policy, and had a right to rely upon such warranties. The statement in his application that he had never been rejected was material, and was warranted to be true by him; and it would be a fraud on the defendant for him to state that he had never been rejected. But if at the time the company received this last application it knew that Dr. M. O'H. had been rejected by it in the past, then that fact would not operate in this case to debar the recovery; for the company, in such case, issuing the policy with the knowledge of the untrue fact, is barred from setting it up as a defense.

So, too, as to representations and warranties as to his health and his relatives; he warranted these statements true, and they were matters upon which the company had a right to rely. However, bearing upon all these answers and warranties, Section 3625 of the statutes of this state provides and says that no answer made in his application for a policy shall bar the right to recover, unless it be proved that the answer was willfully false and fraudulent; that it was material, and induced the company to issue the policy, and but for that, the policy would not have been issued. This is giving the substance or meaning of the statute referred to, and is stated by me as the law governing this case.

I have said to you that all these answers were material; but unless they or some of them were willfully false, and made by Dr. M. O'H., and induced the company to issue the policy, and but for such answer the policy would not have been issued, then any such untrue answer could not operate as a bar to recovery herein.

G. F. Robinson, Judge, in *Total Abstinence Life Association of America v. O'Harra*. Dismissed in Supreme Court No. 3357. Charge approved by Circuit Court, Portage County.

No. 293. Insurance—Life—Misrepresentations made by the insured.—“A misrepresentation or false statement made in his application for insurance, by a person whose life is insured, respecting a material fact, avoids the policy issued upon that application, and this whether the misrepresentation was made innocently or designedly. If, therefore, the jury believed from the evidence that the insured, in his application for the policy or certificate here sued on, stated that he had no serious illness, or stated that he had not had during the last seven years any disease or severe sickness, and that either of those statements were false in any respect, and

are deemed by the jury material, then whether the insured intended to deceive or not, the said policy or certificate is void, and the jury should find for the defendant, unless they further believe that the *avoidance* of the policy or certificate has been waived by the defendant."

Schwarzbach v. O. V. Protective Union, 25 W. Va. 640.

No. 294. Same continued—What constitutes a waiver of misrepresentations.—"There can be no waiver of the avoidance of a policy by reason of material false statements or misrepresentations in the application, unless the acts relied upon as showing the waiver were done with full knowledge of the facts. While, therefore, the receipt of premiums or assessments with full knowledge on the part of the defendant of facts working a forfeiture of the policy, might constitute a waiver of such forfeitures, yet the receipt of such premiums or assessments in ignorance of such facts would not constitute a waiver."

Schwarzbach v. O. V. Protective Union, 25 Va. W. 640.

LANDLORD AND TENANT.

No. 295. Duty of landlord as to walks in and about premises—Injury from walk.—It is the duty of a landlord who lets premises to which there is a common walk, which remains under his own control and is not let to any of the tenants, to use reasonable care and diligence in keeping that walk in repair; and if, by his failure to use that sort of care and diligence, the walk gets out of repair, and a party is injured by reason thereof, without having been guilty of any negligence which contributed to the injury, then he or she would be entitled to recover.

If the walk upon which the plaintiff is alleged to have been injured was a common way, and was under defendant's control, it was his duty to see to its condition, and the fact, if such were the fact, that the plaintiff did not inform defendant of its unsafe condition does not necessarily preclude plaintiff's recovery.

The renting or leasing of a house will include everything belonging to it, or which is reasonably necessary to its enjoyment. It will also include all usual and accustomed ways to the house. Whenever a house is rented or leased, all the

means to which the lessor is entitled to attain the use and enjoyment of the house pass by the renting or leasing to the tenant. These are called appurtenances and pass to the tenant by the renting or leasing of a house without being made. If you find from the testimony and from all the circumstances of the case that so much of the yard and the walk therein, in the rear of No. — — — Street as would be included within the lines of the house so numbered prolonged, are reasonably necessary to the enjoyment of that house, then so much of the yard in the rear of No. — — — Street, and the walk therein, included between the lines of the house prolonged, were included in the renting of the house to the plaintiff, and were under her care and control, and she can not recover in this action, although other tenants of the blocks of buildings of which said No. — — — Street is one have a right of way over the walk.

The fact that other tenants of the row had a right of way in the walk extending through the yard of each of the others does not necessarily show that the custody and control of such part is not in the tenant through whose yard it passes.

From *Thomas J. Emery v. Mary A. Dee*, Supreme Court, 27 W. L. B. 160, No. 1542. H. D. Peck, Judge.

No. 296. Same continued—Defects in walk known to plaintiff—Effect of.—The plaintiff admits that she knew of the defects in the walk. Her knowledge of the defects is a prominent fact in the case to be taken into consideration with all the other facts and circumstances in determining the question whether her own negligence contributed to the accident by which she claims she was injured. And if you should find that by her own carelessness she did contribute to the accident, she can not recover.

The law does not measure degrees of carelessness, and if you find that the plaintiff in any material degree contributed by her carelessness to the injury, she can not recover.

Knowing the defective condition of the walk when she rented the premises, plaintiff was therefore bound to use such increased care in using the walk as its defective condition required, and she can not excuse herself for the want of such care by the plea that she was not responsible for the defects themselves.

From *Emery v. Dee*, Supreme Court, No. 1543.

No. 297. Action for rent under lease—Defense that building was rendered unfit for occupancy by fire—Extent of destruction necessary.—The question, then, is whether in

this case there was such a destruction or such an injury to the premises by the fire and the water—by what occurred at that time resulting from the fire—as that it became unfit for occupancy; because, to justify a lessee in abandoning premises, or insisting upon the termination of a lease, the injury or destruction must go to the extent of rendering the premises unfit for occupancy. It must amount to such destruction as that the premises are unfit for occupancy; not that there must be an absolute wiping out of the building—its absolute destruction from the face of the earth—but it must be such an injury, or the injury must go so far toward total destruction, as that it is no longer suitable to be used for commercial purposes, or for such purposes as it was fairly and reasonably designed to accommodate in its original construction. Mere temporary inconvenience occasioned by a fire would not justify or authorize a tenant to vacate premises, nor would it have the effect to terminate the lease. Mere inconvenience, the mere cessation or interruption to business for a day or two, would not have that effect. It must go to the extent of rendering the premises untenable, so that the situation requires a removal elsewhere.

Now, it is hardly within the province of the court to indicate, I think, just what state of facts would justify a removal, or would justify the terminating of a lease. I only propose, in a general way, to give you general rules for your guidance. As I say, mere temporary inconvenience, a mere wetting of the walls by itself, standing alone, as a circumstance, the wetting of the floors, the mere putting out of the fire by flooding a cellar, if it could be removed within a short time, if the effects could be overcome within a short time—any one of these things alone would not constitute such destruction, or such an injury to the premises as would justify a lessee in terminating a lease. Those are all circumstances to be considered, however, together with other things, with a view of determining whether the building, as a structure, has undergone such injury and such destruction as a whole that it is no longer a structure suitable for the business for which it was designed. If this fire was of such extent and so destroyed these premises as a whole (and I now refer in what I say to the premises as a whole), if they were injured to such extent that there was a burning away of the roof or of the windows, that is spoken of as to make these premises as an entirety unfit for occupancy, unfit to be used in a commercial business, then it was the right of the lessees to vacate the premises and terminate this lease; it was their right to insist upon its being terminated, if such a condition of things

occurred. If there was such a destruction or such injury, if it went to the extent that the building as a whole was untenable, unfit for occupancy, then they would have the right, we think, under the statute, under this lease, to insist upon its termination.

Carlos M. Stone, Judge, in *Weil, Joseph & Co. v. Gilchrist*. Judgment affirmed. R. S. Sec. 4113. The injury contemplated by the statute is a total destruction. *Suydam v. Jackson*, 54 N. Y. 450; *Stitphen v. Seebass*, 12 Daly, 139; *Hillard v. Coalles*, 41 O. S. 662.

LARCENY.

No. 298. Larceny defined.—The statute under which this indictment is brought provides that "whoever steals anything of value is guilty of larceny (R. S. Sec. 6856), and shall be punished as is provided in the statute." It may aid you in arriving at a just and proper verdict by defining some of the terms involved in the crime charged in this indictment.

To steal is to take and carry away feloniously personal goods of another;¹ to take without right or leave. Larceny is the wrongful taking and carrying away by any person of the mere personal goods of another from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property without the consent of the other. Again, larceny is defined to be the wrongful or fraudulent taking and carrying away without color of right the personal goods of another, from any place, with the wrongful intent to convert them to his (the taker's) own use, and make them his property without the consent of the owner.

Again, I say to you, larceny is the taking and removing by the trespass of personal property, which the trespasser knows to belong to another, with the felonious intent to deprive him of his ownership therein.²

¹The word "steal" implies a carrying away. *State v. Mann*, 25 O. S. 668.

²Nye, Judge, in *State v. Michke*, Lorain County Common Pleas. For definition see 2 Bish. Cr. Law, Sec. 758; Clark's Cr. Law, 241; Hawley's Cr. Law, 188.

No. 299. Grand larceny—Essential or material allegations in indictment to be proved.—(Precede by statement of allegations of the indictment.) Material allegations of the indictment and the things which it is necessary for the state to prove before it would be entitled to a conviction at your

hands are as follows: First. That the personal property named in the indictment or some part of it was stolen. Second. That the defendant here on trial committed the offense. Third. That the said property was the property of E. M. Fourth. That said offense was committed within the County of ———, State of Ohio. Fifth. That the offense was committed on or about the ——— day of ———, 18—.

No. 300. What constitutes a taking and carrying away.—In order to constitute the offense of larceny there must be an actual taking or severance of the thing from the possession of the owner, for, as every larceny includes a trespass, if the party be not guilty of a trespass in taking the goods, he can not be guilty of a felony in carrying them away.¹

There must also be a carrying away of the goods taken. When this is done the offense is complete, the crime is committed, and can not be purged by a return of the goods, though the possession be retained but for a moment.²

The felony lies in the very first act of removing the property; therefore the least removing of the entire thing taken, with an intent to steal it, if the thief thereby for an instant obtain the entire possession of it, it is an asportation, though the property be not removed from the premises of the owner, nor retained in the possession of the thief.³

¹ Eckels v. State, 20 O. S. 512; Roscoe's Crim. Ev. 587; 2 Russ. on Crimes 5.

² Id. 3 Greenleaf's Ev., Sec. 156; 2 Russ. on Crimes 6.

³ Eckels v. State, 20 O. S. 512-13. The thing need not be taken into the manual possession of the thief. Lem. Doss v. State, 21 Tex. App. 505.

No. 301. Return of property upon being discovered does not change offense.—The jury are instructed that if the defendant had actually taken the money into his hand, and lifted it from the place where the owner had placed it, so as to entirely sever it, he would be guilty of larceny, though he may have dropped it into the place in which it was lying, upon being discovered, and never have had it out of the drawer.

Eckels v. State, 20 O. S. 508.

No. 302. What constitutes larceny of property where the owner voluntarily parts with its possession.—You are instructed that to constitute larceny in a case where the owner voluntarily parts with the possession of his property, two other conditions are essential. 1. The owner, at the time of parting with the possession, must expect and intend that the thing delivered will be returned to him or disposed

of under his direction for his benefit. 2. The person taking the possession must, at the time, intend to deprive the owner of his property in the thing delivered. But where the owner intends to transfer, not the possession merely, but also the title to the property, although induced thereto by the fraud and fraudulent pretenses of the taker, the taking and carrying away do not constitute a larceny. In such case the title vests in the fraudulent taker, and he can not be convicted of the crime of larceny for the simple reason that, at the time of the transaction, he did not take and carry away the goods of another person, but the goods of himself.

From *Kellogg v. State*, 26 O. S. 15, 18-19. See *State v. Coombs*, 55 Me. 477; *Beatty v. State*, 61 Miss. 18; *Snapp v. Com.*, 82 Ky, 173. As to manner of taking see *Clark's Cr. Law* 248.

No. 303. Grand larceny committed by destruction of property—Intent—How proved.—The state claims that the defendants here on trial took the property named in the indictment and carried it and conveyed it away and destroyed it by burning it up.

The state further claims that defendants took said property with intent to convert it to their own use and then destroy it, for the purpose of depriving the owner of said property.

On the other hand, the defendants deny that they took the property with intent to convert it to their own use, and they further deny that they took the property at all, and they deny that they burned or destroyed the property, and deny that they had anything whatever to do with it.

Now, gentlemen, if you find from the evidence given you in this case that the defendants took the property named in the indictment, or any portion thereof, it will be important for you to determine with what intent they took said property.

Intent can rarely be proved by the direct evidence of the condition of the person's mind, hence the presence or absence of intent must be gathered by considering all the facts and circumstances, to determine whether the acts were accompanied by a criminal purpose or an honest purpose.

If you find from the evidence that the defendants here on trial feloniously took the property named in the indictment, with intent to convert it to their own use, without the consent of the owner thereof, then I say to you that such an act would constitute a larceny of the property so taken.

Again, I say to you if you find from the evidence given you in this case that the defendants here on trial feloniously took said property with intent to destroy it, and thus deprive the owner of it without the owner's consent, such act would constitute larceny of said property.

If you find from the evidence that has been given you on the trial of this case that the defendants here on trial took said property, it will be important for you to determine with what intent they took it. If you find from the evidence that the defendants took said property without the consent of the owner and failed to return it, that fact may be considered in determining with what intent the defendants took the property at the time they took it.

Again if you find from the evidence that the defendants took said property without the consent of the owner thereof, and soon thereafter destroyed it by burning it up, that fact may be considered by you in determining with what intent they took said property.

Nye, Judge, in *State v. Mischke*, Lorain County Common Pleas.

No. 304. Larceny—Of lost money—What essential to constitute.—"Though the money was actually lost and the defendant found it, and at the time of finding supposed it to be lost, and appropriated it with intent to take entire dominion over it, yet really believing that the owner could not be found, that was not larceny and he can not be convicted. The intent to steal must have existed at the time of the taking. It is not enough that he had the general means of discovering the owner by honest diligence. He was not bound to inquire on the streets or at the printing offices for the owner, though if, at the time of the taking, he knew he had reasonable means of ascertaining that fact, that might be taken as showing a belief that the owner of the money could be found. In order to convict, it must be shown that the taking of the property was with felonious intent; that is, with intent to steal under the definition given; and it is not sufficient that subsequently after finding the money it was converted to his own use with felonious intent. The intent must have existed at the time of the finding."¹

If a person finds goods that have actually been lost, and believing at the time, or having good reason to believe, that the owner can be found, but takes possession with intent to appropriate the same to his own use, he is guilty of larceny.²

¹ From *Brooks v. The State*, 35 O. S. 46. For another charge and authorities see *Thompson's Trials*, Sec. 2202.

² *Baker v. State*, 29 O. S. 184; *Regina v. Thurborn*, 1 *Dennison C. C.* 387; *Regina v. Wood*, 3 *Cox C. C.* 453; *Clark's Cr. Law* 255.

No. 305. Value of property must be proved.—Before the defendant can be convicted, you must be satisfied that the property claimed to have been stolen is of some value. If the

state has failed to affirmatively prove that the property was of some value, then it is the duty of the jury to acquit the defendant. This fact must be proved as other facts.

State v. Krieger, 68 Mo. 98.

LIBEL AND SLANDER.

No. 306. Libel per se—Defined.—Libel may be defined as follows: "Any false and malicious writing (and I include printing in the term) published of another is libelous *per se* when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hate or contempt, or hinder virtuous persons from associating with him, or which accuses him of a crime punishable by the laws of the state, or charges him with conduct, the natural or ordinary results of which would be to prevent him from engaging in and pursuing his vocation or profession (as a teacher for instance), or otherwise, and thereby deprive him of the earnings thereof, and which he otherwise would have obtained." By publishing it is meant that the matter must be communicated to some other person or persons than its author. But the terms should not be restricted to this definition alone. We also use the term publication as signifying the matter published, as well as the act of publishing, and sometimes such an act of publishing as is wrongful.

Voris, Judge, in *Carrier v. Findley et al.* For definitions see *Kinhead's Plg.*, Sec. 752; *Watson v. Trask*, 6 O. 533; *Cooley on Torts*, 225-26.

No. 307. Libel defined in *Dean v. Commercial Gazette Co.*, by Judge Sam'l F. Hunt, Hamilton County—Touching upon rights of newspaper—Liberty of press, etc.—Giving most of his charge.—"The Bill of Rights in the Constitution of Ohio declares that every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press. The publisher of a newspaper has exactly the same right and is responsible to exactly the same extent for the abuse of that right as any other citizen. His right and responsibility in the matter of a publication are no more and no less than that of others under like circumstances. A libel has been defined to be a wrong occasioned by writing or effigy.

It has been held in reference to an individual injury to be a false and malicious publication against one, either in print or writing, or by pictures, with intent to injure his reputation, and to expose him to public hate, contempt, or ridicule. Indeed everything written or printed which reflects on the character of another and is published without lawful justification or excuse is a libel, whatever the intention may have been. Any written words are defamatory which impute to another that he has been guilty of any crime, fraud, dishonesty, immorality, vice, or dishonorable conduct, or has been accused or suspected of any such misconduct, or which suggests that the person is suffering from an infectious disorder, or which has a tendency to injure him in his office, profession, calling, trade, or reputation.

A libel consists in the abuse of that constitutional right by maliciously writing or printing, of and concerning another, any language or representation which is false, and the natural tendency and effect of which is to injure such other person in his character and reputation or business in the community where he lives and is known, or in any way to lessen him in public esteem.

It will be your duty to take the article submitted in evidence, read it carefully in whole and detail, and decide as men of judgment and experience if it had such a tendency and effect as contended for by the plaintiff or any of these tendencies and effects, so far as the reputation and character of the defendant are concerned; or whether, on the other hand, as claimed by the defendant, it can not be fairly said to have had such tendencies or effect, or any of them.

If in your judgment the publication of the article in question had no such tendencies and effect as have been mentioned, it will be your duty to return a verdict for the defendant without proceeding further in the case.

If, however, by reason of the publication of the article in question, you should find that the plaintiff was injured in his character and reputation, and has been injured as claimed in the petition, then your verdict must be for the plaintiff, because it is a presumption of law that anything stated in such publication derogatory or injurious to the character and reputation of the plaintiff is false, and the law further presumes that the defendant, in publishing the same, intended to cause whatever injury naturally would and did result from such publication.

As to damages.—

It will be your duty further to consider whether your verdict, if for the plaintiff, shall be for nominal or substantial

damages. In this connection it will be necessary to determine whether, under all the circumstances disclosed by the evidence, the plaintiff has suffered a real or substantial injury as alleged in the petition, or whether he has suffered only what is termed in law a nominal injury. Nominal damages may be presumed from the publication of libelous matter, but the amount of such nominal damages must be left to the good judgment of the jury to be exercised upon all the evidence. The amount awarded for nominal damages must rest in the sound discretion of the jury and may not exceed one cent.

The plaintiff contends that he has been greatly damaged by reason of such publication. If you find that the plaintiff has not suffered any real or substantial injury, he is entitled only to such nominal damages as I have indicated. If the plaintiff suffered real or substantial damages as alleged, then he is entitled to receive such a sum as in your judgment would fairly compensate him for such loss. It may be regarded, too, as settled in this state that in actions of tort, involving malice, fraud, insult, or oppression, the jury may, in estimating compensatory damages, take into consideration the reasonable counsel fee of the plaintiff in prosecuting this action for the redress of his injury as against the wrong-doer, even when there are mitigating circumstances not amounting to a justification.

In order that you may pass intelligently upon the question of damages, if any damages are to be awarded, it will be proper for you to consider the character and reputation and standing of the defendant. The extent of an injury to a person's reputation or character must depend partly on the nature of the publication itself, and partly on the character and reputation of the party involved. The law presumes every man's reputation to be good until the contrary is made to appear.¹ If you find the publication a libel, as the term has been defined, it will be left to you, after all, to say to what extent under all the circumstances and evidence his character and reputation have been damaged thereby, subject only to the propositions of law which have been given to you by the court.

There is no way of reaching an accurate conclusion in cases like the one on trial except through the good judgment of the jury. The law therefore permits the jury to take such a view of all the facts and circumstances properly in evidence in the assessment of damages, and measure such

¹ Kinkead's Code Pleading, p. 724, and note 2; *Blakeslee v. Hughes*, 50 O. S. 490.

damages accordingly as may have been shown by the publication itself.

You are to consider whether the publication complained of was made only with such malice as the law implies from the mere doing of a wrongful act, which is recognized in the law as "implied malice," or with an actual evil intent or express purpose to injure; or that it was not only false but known to be so by the defendant at the time of the publication itself, or recklessly made without inquiry or information upon which the defendant was fairly justified in relying in its publication. It may appear to you on the contrary, that while the defendant may not convince you that he should escape the actual consequences of the alleged libelous matter, if wrongful in fact, yet there was no actual malice on the part of the defendant, no real or conscious intent to injure, no bad motive; that, though in fact false, the defendant in making the publication acted upon information on which he was fairly justified in relying; that there was more or less truth, or a greater or less approach to the truth in this publication to palliate to a greater or less degree, or excuse in a greater or less measure the publication itself. You may consider all those circumstances. It is no defense, nor even a justification, for a newspaper to publish a communication of and concerning another libelous of itself, but at the same time it is proper for the jury to consider all the circumstances connected with such publication in mitigation of damages.²

² Approved by Supreme Court

No. 308. Libel—Liberty of speech and press—Explained.—As to the liberty of speech and the press, the people of Ohio are so jealous of the right of free speech and the free press, that we have provided in our constitution: "That every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; no law shall be passed to restrict or abridge the liberty of speech or of the press." . . .

While calling your attention to the constitutional provision, we must not omit to say that this liberty to freely speak, write, and publish one's sentiments on all subjects is not inconsistent with the protection due to private character, and is coupled with an express declaration of its responsibility for its abuse. It has been well defined as consisting in the right to publish with impunity the truth with good motive and for justifiable ends, but this liberty or privilege can not be justified when it is exercised to publish libelous matter to the injury of another. So far as this action is concerned,

this comprehends the privilege of the defendant publishing company to publish the article in contention.¹

No person or newspaper has any right to trifle with the reputation of any person, or by carelessness or recklessness to injure the good name, profession, or business of another by the publication of libelous matter. It can not do so without answering for the libel in damages; and the greater the influence of the author, if a private individual, and the greater the influence and circulation of the paper, if by a newspaper, the greater the wrong, and makes the duty more imperative to be careful and circumspect in the matter of the publication. No popular greed for defamatory news can be an excuse for its publication; and in no way can it relieve the defendant from legal liability attaching to such publication. The newspaper business like any other must be conducted with due regard to the rights of others. It is a wise rule of law that everyone should conduct himself and his own business affairs in such a reasonable and prudent manner that others be not injured thereby, and the prudence required is commensurate with the hazards occasioned.

Publishers of newspaper articles are subordinate to this rule. As already stated, the truth is privileged when published from good motives and for justifiable ends, but the truth not having been interposed as a defense in this action, the only effect to be given to the evidence offered as to the truth of the alleged libelous matter is to reduce the amount of damages. But this evidence can not operate to defeat recovery for, at least, nominal damages. . . . To reduce your verdict on this ground to nominal damages the proof of the truth of the matter charged should cover the whole of it. That is it should be as broad as the charge and show that the whole of it is truthful, for if any part of it should appear from the evidence to be false, and that part caused injury to the plaintiff, he would be entitled to recover compensatory damages at least.²

¹ See Cooley on Torts, 255, 217 as to liberty of press.

² Voris, Judge, in *Carrier v. Findley*, Summit County Common Pleas.

No. 309. Reasonable criticism may be made by newspaper.—The right to exercise reasonable criticism should be extended liberally to the newspaper press.

Just criticism, though severe, may be a great conservator of the character and morals of the people. To truthfully and fairly hold up to public view and condemnation, conduct that is wrongful and detrimental to social well-being is a very useful and important office of the newspaper press; you are

therefore instructed that whenever the object of any newspaper publication fairly considered is not to injure reputation, but to correct and to hold up to public condemnation that which is hostile to morality and official integrity, does not come within the definition of libelous matter, so long as the author or authors keep themselves reasonably and in good faith within the line of truthful and wholesome criticism.

Voris, Judge, in *Carrier v. Findley*, Summit County Common Pleas.

No. 310. Publishing information received from others—Liability therefor.—A person receiving information from others, which if true would be injurious to the character or reputation of another, is not justified in publishing that information to the prejudice of that other person merely because he believes it to be true; he must not only have good reason to believe it to be true, but he must have published it from justifiable motives, and if it turns out to be untrue, and he acted without due diligence, and another is injured thereby, he can not therefore escape liability.

There is no legal immunity in favor of anyone repeating libelous matter. He who republishes such matter takes the risk of its untruthfulness and liability for what injury it may cause.

Voris, Judge, in *Carrier v. Findley*, Summit County Common Pleas; *Cooley on Torts*, 259 (* 220). Giving with the publication the name of the author is no protection. *Haines v. Welling*, 7 O. 253; *Fowler v. Chichester*, 26 O. S. 9; *Dole v. Lyon*, 10 Johns. 447.

No. 311. Publication made to whom.—To constitute a libel, publication must be made to a person or persons other than the person against whom the libelous words are published.

It would not be libelous for the defendant to send to the plaintiff a communication which would be libelous if sent to a person other than the plaintiff.

Nye, Judge, in *Stevens v. McBride*, Summit County Common Pleas.

No. 312. Slander and libel—Defamatory words must be spoken to some person.—In legal contemplation, defamatory words do not constitute slander, unless they are spoken to some person or persons other than the individual concerning whom they are uttered. To say to one's face any derogatory or evil thing respecting him is no defamation, nor is it a publication in a legal sense to speak slanderous words to a person in a public place, and in the presence of or near to other people, if in fact the words thus spoken are not heard

or understood by anyone excepting the individual to whom they are addressed.

If, therefore, you should find from the evidence that the defendant in this case did use the language imputed to him by plaintiff, and that he uttered the same in the presence of the plaintiff and various other persons, but you further find that the words so spoken by him were not heard or understood by any one excepting the plaintiff, to whom they were addressed, then you are instructed as a matter of law that the acting of the defendant in so using said words was not slander, and the plaintiff can not recover, and your verdict should be for the defendant.

D. F. Pugh, Judge. *Lennon v. Rice*, Franklin County Common Pleas.

No. 313. Words must impute a crime.—To entitle the plaintiff to a verdict it must appear that the words which the defendant spoke imputed to the plaintiff the commission of some crime. If the defendant accused the plaintiff of being a thief, or charged her of having stolen property of his, these words did charge the commission of a crime if there were no qualifying or modifying words used at the same time and in connection with the terms "thief," or "steal," or "stole," because stealing—larceny—is an indictable offense. But if the accusation is or was that the latter took money or any other property of the former, it does not impute a crime, unless other language is used to expand its meaning that far. That is, if you should find from the evidence that the defendant did not use the word "thief," or did not charge the plaintiff with having stolen the property or having committed a theft, but simply used language that she took the property, then such words would not in and of themselves constitute slanderous words, unless other words were used in connection with them to expand them so as to mean that he charged her with a crime.

Pugh, Judge. *Lennon v. Rice*, Franklin County Common Pleas. See *Kinkead's Plg.*, Sec. 753.

No. 314. Libel—Charge of altering certificate—Meaning of words for jury.—We can not say as a matter of law that the charge of altering the certificate, contained in the alleged article, is criminal, there being no published declaration that it was done with the intent to defraud, and no *innuendo* in the amended petition charging that intent. But we leave it to you to say, as a matter of fact, from the evidence, whether its effect was, or was not, to render the plaintiff contemptible in public estimation, or to injure his good

name; whether or not the natural and ordinary effect would be to prevent him from engaging in his profession as a teacher, or be injurious to his feelings.'

Among other things, R. S., Sec. 7991, defines forgery as: "Whoever falsely alters any certificate authorized by the laws of this state with the intent to defraud is guilty of forgery."

Voris, Judge, in *Carrier v. Findley*, Summit County Common Pleas.

No. 315. Privileged communications — Whether extended to member of examining school board.—As to the privilege of the members of the examining board, I will say to you that a member of the board of county examiners is a public officer who performs duties of the highest order. The law makes it obligatory on him to make an intelligent, honest, and thorough examination into the qualifications of every individual who teaches in the public schools of the county. The statute is emphatic on this point. No one can become such a teacher "until he or she has obtained from the board of examiners a certificate of good moral character, and that he or she is qualified to teach orthography, reading, writing, arithmetic, geography, English grammar, and the history of the United States, and possesses an adequate knowledge of the theory and practice of teaching, and, if required to teach other branches, that he or she has the requisite qualifications; provided that after January 1, 1889, no person shall be employed as a teacher in any common school who has not obtained from such a board a certificate that he is qualified to teach physiology and hygiene, and further if at any time the recipient of the certificate be found intemperate, immoral, incompetent, or negligent, the examiners, or any two of them, may revoke the certificate. . . . And when any recipient is charged with intemperance or other immorality, the examining board shall have power to send for and examine witnesses under oath."¹

The power so conferred, and the duties so imposed, create the right to make the most searching inquiry into the conduct, manners, qualifications, morals, intellectual potency of all persons holding certificates, or applying for one. This official discretion should be exercised with sincere, intelligent, and courageous fidelity, and every such teacher or applicant enters as a candidate or upon his public duties as teacher upon the express understanding that his whole conduct, in the respects enumerated, is open to the scrutiny of the examiners and to the fair criticism of the newspaper press.

¹ R. S. Sec. 4074.

To this end the communications and actions of the examining board in the legitimate discharge of their duties, exercised in good faith and reasonably, are privileged and should be fully protected. So any inquiries or communications made by a member of a school board in the honest and faithful discharge of his duties, to enable him to act advisably in respect to the qualifications of the plaintiff as a teacher, and in respect to the certificate he held, or in respect to an expected examination for certificate, should be fully protected, unless he went beyond the domain of reasonable official conduct. And this protection should extend in this case to communications made to the state board of examiners.

You are also instructed that if he found a teacher teaching in the public schools without a certificate, that it would be proper for him to call the attention of the board of education of the proper township to that effect. But it was no part of his official duty to publish in the newspapers of and concerning the plaintiff, any matter or thing implying praise or demerit, or respecting teachers or applicants for certificates. If he does so he does it at his peril, as if he sustained no official relation to the public. His acts in that respect would be determined from the same standard as that applied to any unofficial person. In this respect he stands on the same footing, and incurs the same liability, that private persons do, but in the legitimate discharge of his official duties, exercised in good faith and upon reasonable grounds, his communications are privileged.

A teacher or a candidate for examination as such, comes before the board of examiners with his habits and associations, mental and moral qualifications, in fact his whole character open for their careful, intelligent scrutiny; the board could not discharge its official duties unless the door was open to them to enter upon a careful, and, where character is called in question, a searching inquiry as to the qualifications of the teacher or candidate. To this end, not only must freedom of inquiry, discretion, and communication be had as to all reasonable means of information, but there must be exemption afterwards from liability for words written or spoken in good faith and in the honest belief of the truth, the making of which, if true, will be justified by the occasion, though it should turn out that it was untrue. All that the law requires in such cases is that the officers should act in good faith and reasonably under the circumstances.

² *Voris*, Judge, in *Carrier v. Findley et al.* As to privileged cases, see *Cooley on Torts*, 246 (210).

No. 316. Libel—Reports of judicial proceedings—Privilege.—You are instructed that a full, fair, and impartial report of the judicial trial had in open court, where the parties interested have an opportunity of ascertaining and vindicating their rights, may be published with impunity, providing that they are unaccompanied by malicious, defamatory comment. Reports of judicial proceedings in the absence of express malice, if fair, true, and accurate, and nothing more, are privileged; but as soon as any attempt is made at comment, or misstating the truth, the privilege is lost.

The publication complained of in the plaintiff's petition purports to be a report of the utterances of the judge of the court made in connection with, and as a part of, the judicial opinion delivered in the case then pending in court, wherein this plaintiff was plaintiff, and P. D. was defendant. Such matter, if fairly and truthfully reported and published, is privileged, provided it was done without malice and fairly stated what the court said on that subject. The defendants had the right to publish as part of the proceedings of the trial what the court said in delivering its opinion and deciding the case, provided it was done fairly and truthfully and without malice.

The burden is upon the plaintiff to show by a preponderance of the evidence that the alleged libelous matter contained in the publication is false. It must appear from the evidence that the court, in passing and delivering its opinion in the case of D. v. D., did not express the opinion attributed to it in the publication complained of, or that it did not fairly and truthfully report the case, or what the court said in delivering its opinion, before the defendant can be held liable.

The fact that this publication was a report made through a correspondent, and the claim that the correspondent procured the statement from another person, in no manner lessens the wrong of the defendant for the words which are libelous, malicious, and untrue.

Gillmer, Judge, in *Doyle v. Scripps Pub. Co.*, Trumbull' County Common Pleas. As to privileged communications see *Kinthead's Pldg.*, Sec. 754; *Cooley on Torts*, 246 (210) *et seq.* Where the answer claims the publication to be privileged, and issue is joined thereon, whether or not the same is privileged is for the jury under proper instructions. *Post Pub. Co. v. Moloney*, 50 O. S. 71. Whether the facts which render the publication privileged are established by the evidence is a question for the jury. *Id.* 85.

No. 317. Libel—Publication from report of examining committee of county treasurer.—If you find that the extracts so published were parts of a public record, and you should

also find that the same were published from good motives and for justifiable ends, the defendant would have the right to publish the same and the law would protect him in that right; and in determining the motives of the defendant, you should consider all the evidence before you, including the report itself, which is in evidence, and, if there were portions of this report which were exculpatory in their character, and these were omitted by the defendant in the publication, you may consider this omission in determining the motive which prompted the defendant in making the publications of the extracts so published by him. . . . The defendant urges that the matters complained of were based upon these extracts, and were fair and proper comments thereon. This is denied by the plaintiff, and this brings you to the consideration of the language complained of in the petition. If you have found that the extracts referred to were parts of a public record, and were published in the manner and for the purposes stated, then as a matter of law the defendant would have the right to make any fair and proper comments upon the extracts so published, and which would be fairly warranted by giving to the language embodied in the extracts its fair and natural import, signification, and meaning; but he would have no right to go beyond that and give to the report by his comments a meaning and signification not warranted by the language used in the report. And if in such a publication of such comments in the report he so distorted the language thereof, or the natural import and meaning of that report, and the language used therein, in such manner as to wrongfully impute to the plaintiff malfeasance in office, or charged him with having unlawfully or wrongfully appropriated to his own use the money of the county whilst he was in office, or with having conspired with others so to do, and that the same was false, and you so find from the evidence, then the publication would be libelous and the plaintiff would be entitled to recover.

Johnston, Judge, in *McMaster v. Caldwell*.

No. 318. Comments upon report made with good motives, etc.—But if the defendant, in publishing comments upon extracts from the report, acted from good motives and for justifiable ends, and his comments thereon were fairly warranted by the language of the report, then the defendant would be justified in so publishing such comments, and the plaintiff would not be entitled to recover in this action. . . . To show that defendant published such comments for justifiable ends he must satisfy you from a preponderance of the

evidence that the same was published by him in good faith, for the purpose of protecting the interests of society and to produce purity in public affairs, or some other kindred purpose, whereby the general welfare of the community was to be promoted, and if you are so satisfied, then this would establish the fact that the same was done from good motives, and this would constitute a defense to this action.

J. R. Johnston, Judge, in *McMaster v. Caldwell*.

No. 319. Statements made to officer in discovering crime, privileged.—Statements or inquiries made to an officer of the law or to others for the purpose of discovering a crime or of bringing a guilty person to justice are privileged and do not constitute slander, provided they are made on reasonable grounds, in good faith, honestly, and without malice, even though in fact they may be false and unfounded. You are, therefore, instructed, gentlemen, that you can not in your deliberations, for the purpose of establishing the plaintiff's charge of slander against the defendant, consider any statement or statements made by the defendant to the police officers for the purpose of securing an officer with respect to his suspicions that plaintiff had stolen or taken from his residence linen or other articles of value, provided such statements were made without malice, and in an honest belief in their verity, and were also made for the purpose of securing the assistance of the officer with a view to the promotion of justice.

Pugh, Judge. *Lennon v. Rice*, Franklin County Common Pleas.

No. 320. Construction of words and understanding of meaning by hearers.—All of the words which it is charged the defendant uttered, having been spoken in one conversation at one time and place, they must be construed and interpreted together, and in connection with the surrounding circumstances. To constitute slander, the words used so taken and construed and in connection with the surrounding circumstances must have been understood by a third person or persons who heard them, if there were such persons, in the 'evil sense which the law requires; that is, as imputing the commission of a crime. *Prima facie*, they will be "presumed to have been understood according to their common import, and as they would naturally impress the minds of the hearers or as the defendant meant them." It is a question whether the words used by the defendant, even if they were thus set out in the petition or their equivalent, are not ambiguous. If they are of doubtful meaning, and do not fairly and reason-

ably, when taken and construed together, imply that the plaintiff was a thief, or had stolen the property, it can not be said that they were slanderous.

Pugh, Judge. Lennon v. Rice, Franklin County Common Pleas.

No. 321. Effect of adding excusable words.—If the words uttered by the defendant meant that the plaintiff committed an indictable offense, and that the plaintiff added to these words that the plaintiff was irresponsible mentally, or insane, or words to that effect, these words taken all together do not constitute slander; if you find that to be the signification of all the words which were used by the defendant, then you are instructed that they charge merely an offense which was excusable. To charge a person with such an excusable offense is not actionable as slander.¹

If the charge of a crime was not qualified or modified by other words used in connection therewith, they were slanderous and imputed a crime of a serious nature. If that was their import, they were calculated to cause great injury to the feelings and reputation of the plaintiff. Indeed the law deems language which imports such a crime when spoken in the hearing of a third person, or persons, as defamatory, as actionable in itself, and it will presume as the court and jury must presume, without any proof, that the plaintiff's reputation was thereby impaired.²

¹ The Court said in this connection that he was in doubt as to whether or not the Court or jury should pass on the meaning of the words set forth in the petition or proof, but finally committed the matter to the jury.

² Pugh, Judge, in Lennon v. Rice, Franklin County Common Pleas.

No. 322. Libel—Meaning of words for jury.—It will be necessary for you to determine from the letters themselves whether the words and language used therein, imputing to the plaintiff that he has been guilty of any crime, fraud, dishonesty, or dishonorable conduct, or which have a tendency to injure him in his office, profession, calling, or trade. If you find from the evidence that the language used in said letters, or either of them, is such as to fairly and properly charge or impute to said plaintiff that he has been guilty of any crime, fraud, dishonest, or dishonorable conduct, or which have a tendency to injure him in his office, profession, or calling, then they are libelous. Whether or not the language complained of as libelous will bear the meaning ascribed to it by the *innuendo*, whether such was the meaning intended, is a question of fact for the jury.

Nye, Judge, Stevens v. McBride, Summit County Common Pleas. Whether language will bear the meaning claimed in the innuendo is a

question for the Court, and whether that meaning was intended is for the jury. *State v. Smiley*, 37 O. S. 30; *Boyle v. State*, 6 O. C. C. 163; *Gohen v. Cincinnati Volksblatt*, 31 W. L. B. 111; *Dougherty v. Miller*, W. 36; *Getchell v. Tailor's Exchange*, 26 W. L. B. 233.

No. 323. Libel—Meaning of words.—It is for the jury to determine from the testimony the meaning of the words which are charged to have been published of the plaintiff; and in determining their meaning, you should construe them in their plain and ordinary sense, and take them to mean what persons of ordinary intelligence would take them to mean.¹ Having thus determined their meaning, you should then say, was that meaning such as was reasonably calculated to injure the plaintiff's reputation, or expose him to ridicule; distrust, contempt, or hatred.²

¹ *Cassidy v. Brooklyn Daily Eagle*, 138 N. Y. 239.

² *Wright, Judge, in Horton v. Enquirer Company.*

No. 324. Kinds of malice in slander.—There are two kinds of malice that may enter into a slander case. They are malice in law, sometimes called imputed or legal malice, and actual malice. Legal malice does not mean that the defendant had actual ill-will, or hatred, or a feeling of revenge, or an unfriendly feeling against the plaintiff. If the slanderous words were spoken voluntarily and without legal excuse, they were, in the eye of the law, spoken maliciously. The law presumes a wrongful intention—malice—when the words are shown to have been uttered without justification.

Legal malice may be presumed without direct proof. Without evidence legal malice is inferred when the slanderous words were not spoken on a justifiable occasion. If the words were spoken on a justifiable action, for instance, to an officer or others for the purpose of ascertaining about a supposed crime, if there was a legal excuse for speaking them, legal malice can not be inferred.

Actual malice signifies actual ill-will, hatred, revenge, jealousy, and the like. This kind of malice must be proved as any other fact is, by evidence. The law does not presume it, and the jury can not infer it without evidence to warrant such an inference.

To entitle the plaintiff to recover compensatory damages, it is not necessary that she should prove that the defendant was actuated by actual malice in speaking slanderous words.

Pugh, Judge, in Lennon v. Rice, Franklin County Common Pleas.

No. 325. Damages—Kinds of.—The question of damages will have to be considered by you in case you find for the

plaintiff upon all the issues. There are two kinds of damages—compensatory and exemplary or positive damages. The object of the law in allowing the first kind of damages is to make the plaintiff whole for outraged feeling and for the injury to his character or reputation, whereby he was compelled to appear in one of the tribunals of his country and vindicate his character against aspersions upon him. If the evidence satisfies you that the defendant spoke the words set out in the petition, or words substantially like them in meaning, that he spoke them in the hearing of a third person, or persons, that he uttered them maliciously, in the sense of legal malice, and if you find that there are no mitigating circumstances, then he is entitled to such compensatory damages as in your judgment will make him whole for the injury to his reputation, and for outraged feelings, and including also a reasonable attorney's fee for prosecuting this suit.

It is true that there is no arithmetical standard for computing these damages. Character has no price in the market as property has, by which the damages can be measured. It may not be easy to say what the damages are, but that does not relieve the jury from ascertaining and declaring what they are if the injury has been to the plaintiff. Of course it is not the idea of slander suits that the plaintiff is to make money or to speculate upon his reputation. Much is left to your sound judgment and discretion acting upon the evidence, and there is nothing that the court can say that will aid you. It is for you to say how much the plaintiff's reputation has been damaged. In estimating the damages it is your duty to take into consideration mitigating circumstances, if any have been proved. If the words were not spoken with actual malice, personal ill-will, hatred, or some such feeling, you can only allow compensatory damages. But if you find that the alleged slanderous words were uttered with actual malice, then you may add exemplary damages. The whole are assessed, if at all, on the ground of public policy, and not because the plaintiff has any right to the smart money, as it is often called. The object of the law, as the term implies, is to punish the wrong-doer in dollars and cents, and to give a warning to prevent a repetition of the wrong or a similar wrong by others. The amount is left to your judgment.

From *Lennon v. Rice*, Franklin County Common Pleas. Pugh, Judge. Compensatory damages cover injury to feelings, loss of business, expenses in vindicating character, 1 *Disney* 482.; mental suffering from loss of reputation. 21 *W. L. B.* 292.

No. 326. Libel—Counsel fees allowed in compensatory damages.—"If the defendants published a paper in manner and form as alleged, and injury resulted to the plaintiff from and by reason of such publications, he will be entitled to recover such damages as he has directly sustained; and in estimating compensatory damages the jury may take into consideration and include reasonable fees of counsel employed by the plaintiff in the prosecution of his action. If the publication was made with a bad motive or wicked intention, the jury may go beyond mere compensation and award vindictive, or punitive damages—that is, damages by way of punishment."

From *Finney v. Smith*, 31 O. S. 529. Costs in clearing up the charge may be included. *W. 316; 1 Disney 482.*

No. 327. Extent to which libel is published as affecting damages.—The extent to which a libel is published may affect the amount of damages for injury done. If the libel is published to a large number of persons, and in a public place, that would have a tendency to cause a person against whom the libel is published more injury than if published to a single person and in a private house.

Nye, Judge, in Stevens v. McBride, Summit County Common Pleas.

No. 328. What constitutes libel to one in his business.—The defendant, for a second defense, pleads that the article in question appeared on the — day of —, A. D. 18—, in the —, in what is known as the six o'clock edition, an edition of comparatively small circulation; that the matter contained in the article would have appeared on the following day in the editions of the — day of —, except the six o'clock edition, according to the course of business in the office of the defendant, but for the agreement entered into by plaintiff and defendant by which the plaintiff, on the — day of —, aforesaid, and after said publication, through his authorized attorney, appeared at the office of the defendant and thereupon agreed with defendant that if defendant would not publish said article on the — day of —, that the plaintiff would consider the matter of the publication of the — to be adjusted and settled, and that he would make no claim against defendant by reason of said publication, and that the defendant, in accordance with said agreement, withdrew said article from further publication.

A reply has been filed which puts in issue the second defense in the amended answer.

The first question for you to decide, therefore, is whether

the article in question amounts to a libel upon the plaintiff, and to this end it will be necessary to determine what constitutes a libel.

The Constitution of the State of Ohio, in Section 11 of the Bill of Rights, provides that every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to abridge or restrain the liberty of speech or of the press. The publisher of a newspaper has exactly the same rights and is responsible to exactly the same extent for the abuse of that right as any other citizen. His right and responsibility in the matter of a publication are no less than that of others under like circumstances.¹ A libel may be defined to be a wrong occasioned by writing or effigy. It has been held, in reference to an individual injury, to be a false and malicious publication against one, either in print or writing, or by pictures, with intent to injure his reputation, and expose him to public hate, contempt, or ridicule. Indeed, everything, printed or written, which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been. Any written words are defamatory which impute to another that he has been guilty of any crime, fraud, dishonesty, immorality, vice, or dishonorable conduct, or has been accused or suspected of any such misconduct, or which suggests that the person is suffering from an infectious disorder, or which has a tendency to injure him in his office, profession, calling, or trade.

A libel consists in the abuse of that constitutional right by maliciously writing or printing, of and concerning another, any language or representation which is false and the natural tendency and effect of which are to injure such other person, as in this case, in his business standing and reputation in the community where he lives and is known, or in his trade or business, and hold him up to ridicule or contempt, or in any way to lessen him in public esteem.

It will be your duty to take the article submitted in evidence, read it carefully as a whole and in detail, and decide as men of judgment and experience whether, as contended by the plaintiff, it had such a tendency and effect, or any of them, so far as the business reputation of the plaintiff or his calling or his trade are concerned, or whether, on the other hand, as claimed by the defendant, it can not be fairly said to have had such tendencies or effect, or any of them.

If in your judgment the publication of the article had no

¹ Cooley on Torts, 256 (218).

such tendencies or effect as have been mentioned, it will be your duty to return a verdict for the defendant without proceeding further in the case.

If, however, by reason of the publication of the article, you should find that the plaintiff was injured in his reputation and trade, and has suffered a diminution of his business as a retail clothier, and has been otherwise injured in his business reputation, then your verdict must be for the plaintiff, because it is a presumption of law that anything stated in such publication which is derogatory to the business reputation and trade of the plaintiff as alleged is false, and the law further presumes that the defendant, in publishing the same, intended to cause whatever injury naturally would and did result from such publication.²

²From Cincinnati Times-Star Co. v. Kahn. Judgment affirmed (in favor of Kahn), 52 O. S. 662.

No. 329. Measure of damages to one in his business.—

It will be your duty next to consider whether your verdict, if for the plaintiff, shall be for nominal or for substantial damages. In this connection it will be necessary to determine whether, under all the circumstances disclosed by the evidence, the plaintiff has suffered a real and substantial injury to his trade or business reputation, or whether he has suffered only what is termed in law as a nominal injury. Nominal damages may be presumed from the publication of libelous matter, but the question of the amount of such nominal damages must be left to the good judgment of the jury to be exercised upon all the evidence. The amount awarded for nominal damages must rest in the sound discretion of the jury and may not exceed one cent.

The plaintiff contends that he has been greatly injured in his business reputation, and has lost a large number of customers, and has suffered a diminution of his business to a great extent and has been otherwise injured in his reputation. If you find that the plaintiff has in fact not suffered any real or substantial injury in these respects, he is entitled to nominal damages only to vindicate his right.

If the plaintiff suffered real or substantial injuries, as alleged, then he is entitled to receive such a sum as in your judgment would fairly compensate him for such loss. It may be regarded as settled in this state that in actions of tort involving malice, fraud, insult, or oppression, the jury may, in estimating compensatory damages, take into consideration the reasonable counsel fee of the plaintiff in prosecuting this action for the redress of his injuries against the wrong-doer,

even when there are mitigating circumstances not amounting to a justification.

From Cincinnati Times-Star Co. v. Kahn. Judgment affirmed (in favor of Kahn), 52 O. S. 662.

No. 330. Measure of damage to business continued—Character and extent of business—And business reputation to be considered—In order that you may pass intelligently upon this question of damages, if any damages are to be awarded, it will be proper for you to consider the character and extent of the business in which the plaintiff was engaged, as well as his previous reputation in such trade or business. The extent of an injury to one in his trade or business, or in his reputation in relation to such trade or business, must depend partly on the nature of the publication itself and partly on the character and extent of his business or trade. For instance, a man's reputation in business may be so good as to be firmly established in public confidence so that it can not well be injured by any such publication as that of which the plaintiff complains; or it may be so bad as to be incapable of serious injury therefrom; or, while good, yet not so firmly established in public esteem as to prevent injury resulting to it. The law presumes every man's reputation as a tradesman to be good until the contrary is made to appear. The testimony on that subject must be carefully weighed and considered. If you find the publication a libel, as the term has been defined, it will be left to you after all to say to what extent, under all the circumstances and evidence, his reputation in business has been damaged thereby, and to what extent he has been damaged in his trade and business, subject only to the propositions of law which have been suggested by the court.

A man's known reputation in the community, or general estimation in which he is held in the business community where he lives and moves and is known, while it is the resultant of the opinion of all, it is not the individual opinion of any particular person or persons. You will decide what the known reputation of the plaintiff was at the time of this publication, for in view of all the evidence you are limited to his business reputation, and you can not go into particular acts.

From Cincinnati Times-Star Co. v. Kahn. Judgment affirmed. 52 O. S. 662.

No. 331. Measure of damage to business continued—Effect of absence of malice—Mitigating circumstances—Effect of acting upon fairly reliable information—There is no

way of reaching a correct conclusion in cases like the one on trial except through the good judgment of the jury. The law, therefore, permits the jury to take such a view of all the facts and circumstances properly in evidence in the assessment of damages and as may appear fairly from the preponderance of the evidence. It may appear to you that the publication complained of was made only with such malice as the law implies from the mere doing of a wrongful act, which is recognized in the law as "implied malice"; or with an actual evil intent or express purpose to injure; or that it was not only false, but known to be so by the defendant at the time of the publication itself, or wantonly made without inquiry or information upon which the defendant was fairly justified in relying; or that there was nothing in the character, conduct, or position of the plaintiff to palliate or excuse such publication. It may appear to you, on the contrary, that while the defendant may not convince you that he should escape the actual consequences of the alleged libelous matter, if wrongful in fact, yet there was no actual malice on the part of the defendant, no real or conscious intent to injure, no bad motive; that though in fact false, the defendant in making the publication acted upon information on which he was fairly justified in relying; that there was more or less truth, or a greater or less approach to the truth in this publication, or that there was something in the business reputation of the defendant, or in the methods of doing business, or in the character of the business itself, or in any reports which may have existed in police circles, or in the letter as introduced in evidence—any such information may have reached the defendant prior to the publication itself—to palliate in a greater or less degree, or excuse in a greater or less measure, the publication itself.

In case you find all or any of the circumstances last mentioned to have existed, while they do not make out a complete defense to entitle the defendant to a verdict, if you first find the publication in fact to be libelous, they are yet matters which you have a like discretion to consider and diminish your assessment of damages accordingly, in case you award damages to this plaintiff at all. These, in legal definition, are termed mitigating circumstances.

In ascertaining whether there were mitigating circumstances, or whether there were aggravating circumstances, it will be proper for you to consider all the evidence, direct and circumstantial, in order that you may reach a correct conclusion. It is the province of the court to instruct you of the law; it is the province of the jury to analyze and weigh the

evidence. It is the province of the court to pass upon the competency of the testimony; it is the province alone of the jury to weigh that testimony.

From Cincinnati Times-Star Co. v. Kahn. Judgment affirmed. 52 O. S. 662.

No. 332. Measure of damages—Effect of agreement to accept retraction of publication—The defendant in its amended answer pleads as a second defense that an agreement was entered into by the plaintiff and defendant through counsel. It is a good defense to an action for libel that if, after the publication, the plaintiff agreed with the defendant to accept the publication of an apology in full for his cause of action, and that such an apology had been published. The burden of proof, however, in a defense such as is alleged in the amended answer, is upon the defendant to show that such an agreement was made, and that there was a good consideration for the same, and that it was carried out in good faith, and that the plaintiff so agreed to accept such retraction in full satisfaction of any claim which he may have had by reason of the publication. The evidence on this point must be governed by the proposition of the law as I have indicated it.

From The Cincinnati Times-Star Co. v. Kahn. Judgments affirmed, (in favor of defendant in error), 52 O. S. 662. An offer to retract may be shown in mitigation. Newell, Def. p. 907; 144 N. Y. 144.

No. 333. Slander of candidate for office.—There has been testimony submitted for your consideration tending to prove that whatever the defendant did say of the plaintiff and his business was said of him as a candidate to an elective office, and in commenting on the character of his fitness, abilities, and qualifications for the office for which he was a candidate. A candidate for office puts the character of his fitness, abilities, and qualifications in issue. His conduct and acts, whatever they may be, may be freely commented on and boldly censured, and statements made of a candidate for office in good faith by a voter, when made by one who has a reasonable ground to believe them true, and does so believe them to be true, are privileged, and no recovery can be had, unless the proof clearly shows them to have been maliciously made; but malicious defamatory assaults on his private character, falsely imputing to him crime, can not be justified on the ground of criticism, nor claimed to be privileged. The character and reputation of a person who is a candidate for office is as sacred then as at any other time, and if one without probable cause states what is false and asper-

sive, he is liable therefor, as falsehood and the absence of probable cause amount in law to proof of malice.

You will therefore carefully examine all the testimony before you, that you may know all the circumstances and conditions under which the words were spoken by the defendant, should you find they were spoken by him, the motive, object, and purpose, if any, he had in speaking them, and if you find such statements to have been made in good faith by him about the plaintiff as a candidate for office, that at the time he so made them he had a reasonable ground to believe them to be true, and did so believe them to be true, then such statements would be privileged and your verdict will be for the defendant.

J. L. Greene, Judge, in *Nichols v. Fenn*, 51 O. S. 588. Judgment affirmed.

A newspaper may discuss properly the habits and qualifications of a candidate for office. *Hunt v. Bennett*, 19 N. Y. 173; *State v. Balch*, 31 Kan. 465. It will be liable if it makes a false accusation of crime. *Bronson v. Bruce*, 59 Mich. 467.

No. 334. Libel against one in his business as a bricklayer and contractor—By a bricklayer's union.—It is libelous to falsely and maliciously charge a journeyman bricklayer, who holds himself out as capable of such service and seeking employment, to be an inferior workman, and it is likewise libelous to falsely and maliciously charge one who holds himself out as a bricklaying contractor (capable and seeking such contract work as his occupation and business), as being a contractor who employs inferior bricklayers to do his work and thereby imposes on the owners of buildings for whom he does work as such contractor.

The law presumes the reputation of plaintiffs to be good in respect to their trade or profession, and that they employ men who have the usual, ordinary skill of the trade they are serving in, until the contrary appears in proof.

If you find that the defendants did in fact maliciously issue and distribute this circular, that it is false as to the essential charge, that the plaintiffs employed "inferior labor" and "inferior bricklayers," then the plaintiffs are entitled to recover damages therefor.

The law authorizes you to assume that when one makes a false and libelous charge against another, which tends to do him an injury, he did so in malice.

The defendants have offered proof as to the character of some of the work done by plaintiffs and their men before the issuing and distribution of the circular, which was not admitted to prove the truth of the circular because they did not,

by their answer, make issue as to its truth, but it was admitted and is competent and proper to be considered as to the motive, malice, if any, on good faith they had in issuing and distributing the circular. If they honestly knew or had heard of said work, and believed in good faith that it was inferior work, and work caused by plaintiffs employing inferior workmen, then you should consider that fact as in mitigation of damages.

If the jury find for plaintiffs on the proof according to the law as I have stated it, you should give such verdict as will fairly and justly compensate them for the injury issuing and distribution of such libelous charge reasonably caused them as to their reputation, in respect to their trade and occupation, and for such annoyance and distress of mind as they may have suffered in consequence of such publication.

And if you find there was malice in the purpose and act of the publication, you may also include in the verdict what you estimate as reasonable attorney fees for prosecuting this cause of action.

And if the publication was done in such excessive degree of malice as that, in your judgment, compensatory damages are not a sufficient loss and punishment for the act done, then you may include in your verdict also such sum of money as you consider just to be recovered in the name of the plaintiffs for their benefit, as by way of a punishment of defendants, and to prevent a repetition of like publication.

But, gentlemen of the jury, have a care that your verdict in this respect is just and reasonable, remembering that the law entrusts you with a large discretion in this respect. As punitive damages you can allow nothing, or whatsoever sum you deem just.

On this question as to motive, malice, and the degree of it, consider all the facts in proof, including the original controversy of the parties and the matters between them occurring prior to the publication of this circular.

Morris L. Buchwalter, Judge, in *Bricklayers' Union v. Parker*.

An agreement between a number of persons not to work for a certain manufacturer, with a view to oppress or disable him in his business, or constrain him to submit to rules in its conduct, is unlawful. He has a right to manage his own affairs without interference from others according to his own will and discretion.

The following authorities sustain plaintiffs' right to damages for the conspiracy to destroy their business, and to an injunction against a repetition of the wrongs complained of, and show that the trial court committed no error against the defendants below, either in its general charge or refusal of special charges: *Crump v. Commonwealth*, 84 Va. 927; *Baughman v. Richmond Typo. Union*, Va. Law Journal, April 1887; *S. C. 24 Central L. J.* 289; *Carew v. Rutherford*, 106 Mass. 1; *Walker v. Cronin*, 107 Mass. 555; *Sherry v. Perkins*, 147 Mass. 212; *State v. Donaldson*, 32 N.

J. Law, 151; Van Horn v. Van Horn, 52 N. J. Law, 284; State v. Stewart, 59 Vt. 273; State v. Glidden, 55 Conn. 46, approved 20 Irish Law Times, 305; Mapstrick v. Ramge, 9 Neb. 390; Brace v. Evans, 3 Ry. and Corp. L. J. 561; Old Dominion Steamship Co. v. McKenna, 30 Fed. Rep. 48; Emack v. Kane, 34 Fed. Rep. 47; Casey v. Typographical Union, 45 Fed. Rep. 135; Coeur D'Alene, etc. Min. Co. v. Miner's Union, 51 Fed. Rep. 260; Toledo, etc. Ry. Co. v. Penna. Co., 54 Fed. Rep. 730, 746.

No. 335. Same continued—Combination and conspiracy by the union to impoverish—By circulation of libelous circular.—The plaintiffs claim that the defendants, the ——— Union No. 1, of ———, composed of three or four hundred members (then including the individual defendants), have from the — day of ———, 18—, to the date of the filing of their petition herein on the — day of ———, 18—, endeavored to coerce them to submit the conduct and management of their business to the dictation and control of the said defendants' union, as provided by the constitution and by-laws set out in the amended petition; and that, in consequence of plaintiffs' refusal, the defendants, its officers, agents, and members, including the individual defendants, unlawfully combined and conspired together to impoverish the plaintiffs, to diminish their gains and profits in their business of brick-layers and contractors, and as dealers in materials therein, to prevent them from carrying on and to break up and destroy their said business.

And they further aver that, to accomplish the object of said unlawful combination, the said ——— Union maliciously adopted the circular letter as set out fully in the petition, and that it and the other defendants caused the same to be printed and circulated to various dealers in and manufacturers of building materials, including the patrons and customers of the plaintiffs. That they sent agents and committees to notify the plaintiffs' patrons and customers, verbally and by circular, then dealing with them, selling and delivering material necessary in their business, and to others, that they should withdraw their patronage and not deal with plaintiffs.

And it is also charged that in furtherance of said conspiracy, when plaintiffs' patrons and customers failed to submit to said demands, the said defendants pursued a like purpose by like methods against them and their business and trade in the particular builders' material as supplied to their respective customers.

That defendants, with the same purpose and by like methods, interfered with their workmen in their service, under contract for a period of service, induced them to quit plaintiffs, and deterred others from becoming their employees.

That with the same purpose and by like methods they

induced persons with whom plaintiffs had contracts for building work and for materials to break them, and deterred and prevented others from giving them contract work; all to the damage of the plaintiffs in the sum of \$——.

All these claims and charges by plaintiffs the defendants deny.

In this contest the proof has taken a wide range, including necessarily many matters of controversy as to facts and as to the purpose, intent, and motive which characterized the acts done and the meaning of the things said by the parties.

The controversy submits to us the consideration of this rule of law: If the defendants combined together to commit an act unlawful either as in the sense of being criminal or in violation of plaintiffs' private rights for which they would have a right of recovery in damages, or if they combined to do a lawful act by means of acts unlawful, either criminally or civilly, then, in either such event, the combination is illegal.

If men conspire together to do an unlawful act, or to do a lawful act by unlawful means, then one knowing the purpose thereof, entering into such conspiracy, is bound by all the things said and done by any of their number in carrying out the purpose of such conspiracy, so long as he remains therein and does not withdraw.

Morris L. Buchwalter, Judge, in *Bricklayers' Union No. 1 v. Parker*, S. C. Judgments affirmed.

No. 336. Same continued—Right to conduct one's own business—Right of workmen and unions.—The plaintiffs had the legal right to conduct their business of contracting bricklayers by the purchase of their material of such persons as they deemed best, in the honest promotion of their trade and occupation.

They likewise had the same freedom and right in the employment of their workmen, and in fair competition with others of their trade, to obtain contracts for work. Likewise had the several workmen, members of the defendant union, in the honest purpose of looking to their individual welfare, the right to work for whom they preferred, and, if not under contract for stipulated time, to quit the service of anyone and go to the service of another, or to rest from labor.

And it is the province of the law to protect all alike, the owner, the materialman, the contractor, and the laborer, be they members of so-called "unions" or not, be they skilled or unskilled. The law makes no distinction between them because of the service or occupation of either. Every man's

labor and skill are his own property, often they are his sole dependence and means of support for himself and family, and they are his only certain and satisfactory means in the accumulation of property.

It is essential to the laborer's welfare and manhood that he and his labor shall be free; the laborer, as the employer, who very frequently is only one step in the way of prosperity removed from the laborer for wages, has the same need for freedom of action in his field of service.

Sometimes in their competition they come into conflict; but they must remember that each may, in the pursuit of his occupation, do whatsoever he will, only so long as it does not infringe upon the equal freedom and right of the other. Workmen have the right to organize into unions for the common benefit of their members, for the purpose of advancing their skill, for mutual charities, and may bind themselves by rules, constitutions, and by-laws within the scope of such purposes of organization. They may, for their own interests, make reasonable regulations as to how and whom they will instruct in the skill of their trade, and they can not be compelled to teach others against their will. They may persuade others not to enter their trade, they may refuse to work with or instruct those not registered in their union; and they may with an honest purpose refuse to work with men obnoxious to their interests, men expelled for reasons in good faith to them, or with men who refuse to join them, or refuse to work for any particular employer or contractor; they have a right to select their employer, and they may in combination refuse in good faith to work for any man justly obnoxious to them.

They may, with like honest purpose to promote their united good, fix hours of labor per day and rate of wages, uniform or modified in rate, and they may encourage others to their order.

They may combine for the honest purpose of benefiting their order by encouraging favorable terms to their employers in the purchase of material, and to procure contracts for such contractors as employ members of their union; but they become engaged in illegal enterprise whenever they agree to accomplish their purpose by threats, intimidation, violence, or like molestation, either towards the apprentice, the expelled member, the non-union workman, the contractor and employer, the materialman, or the owner who proposes to make a contract.

The like rule of legality or illegality applies to the contractor or employer as the purposes for which he may become and act as a member of the so-called "Boss Contractors' Union."

The threat may be by word, gesture, sign, or tone, and when you consider whether any particular line of conduct or things said or done had menace or threat in it, you must consider all the circumstances under which the things are said or done, what reasonably was the intent sought to be conveyed by the person uttering the word or doing the thing.

Morris L. Buchwalter, Judge, in *Bricklayers' Union v. Parker*, S. C. Judgments affirmed.

No. 337. Same continued—Measure of damages.—If the distribution of the various circulars in proof, the various calls of certain of the defendants, and their demands upon the materialmen, were part of a combination by defendants to coerce the plaintiffs into a discharge of their apprentice, their brother, and the other non-union men, and the employment of union men, against their will, or otherwise with the intent to impoverish them and break up their contracting business, and you further find that defendants did threaten the respective materialmen, customers, and patrons of the plaintiffs with injury to their property by loss of a large portion of their trade if they refused to comply with defendants' demand; that such threat or threats did reasonably put said materialmen in fear, and you further find that by reason thereof defendants did intimidate said materialmen so as to cause them to refuse to trade with and sell to the plaintiffs, or caused any of them to deal with plaintiffs on different conditions and terms than theretofore, to the damage of the plaintiffs, then the plaintiffs are entitled to recover such damages from the defendants.

If the plaintiffs are entitled to recover upon each of the matters separately submitted to you, your verdict should be made up as follows:

For inducing workmen to quit the service of plaintiffs, such damage, under all the proof, as fairly compensates them for the direct loss of such service. That loss would be the expense and value of time in procuring workmen to take their places, difference of wages, if any, shown by the proof, for the equivalent service, and any direct damage by delay of work necessary in making the exchange of hands.

For injury, if any, by reason of defendants' conduct with materialmen, such damage as fairly compensates for loss of time, any extra cost, if any, for the time, sand, and brick, and their delivery, over what they would have cost them without any interference by defendants.

And if you find for plaintiffs as to the brickwork of the Little Sisters of the Poor, the amount should be damages as

fairly compensate for the loss of the work or contract, which should be estimated by deducting reasonable and probable cost, or what it was then worth to perform the contract, from the amount of plaintiffs' bid therefor.

In estimating what it was worth, or what it would then cost, you are to assume that the work would have been conducted in what you deem would have been the reasonably prudent and ordinary way. You should also take into account the services of the plaintiffs to superintend it, and the ordinary risks and conditions of such enterprises.

And by way of damages to be included in any amount you may find interest at the rate of six percent per annum from the time when such damage accrued to the — day of —, 18—, the beginning of this term of court.

If you find compensatory damages for the plaintiffs, and you further find that the defendants caused the injuries complained of maliciously, then you may add thereto, as compensatory damages, such sum as you think just for plaintiffs' expense in employing counsel to prosecute this cause of action. No testimony is admissible to prove the value, but you have had opportunity to estimate the same by actual observation of the service rendered by their attorneys.

And now, if, in the judgment of the jury, the defendants were actuated by such excessive degree of malice that mere compensatory damages are not, in your opinion, sufficient loss to and punishment of the defendants, then the law authorizes you to include, as part of your verdict, such sums of money as you justly think ought to be recovered in the name and for the benefit of the plaintiffs, as exemplary or punitive damages. The law leaves it wholly to the discretion of a jury whether any sum whatever, and if any, how much, should be added therefor.

You will see to it that your care to administer justice in this respect will be in proportion to the large discretion which the law imposes on you, remembering that when you take from one to give to another as a punishment, it must only be in such sum as is just.

Morris L. Buchwalter, Judge, in *Bricklayers' Union No. 1 v. Parker*, S. C. Judgments affirmed.

MALICIOUS PROSECUTION.

No. 338. Malicious prosecution of criminal action—Questions to be considered by jury—Burden of Proof.—The real inquiry for your consideration is narrowed down to the following questions:

Did the defendant institute the criminal prosecution set out in petition, and thereby cause the arrest of the plaintiff without probable cause, as the term is hereafter defined? Was he actuated by malice, either actual or implied? Did plaintiff suffer damages by reason thereby?¹

To enable the plaintiff to maintain this action it must appear by a preponderance of the evidence that both malice and want of probable cause concurred, and the burden of proof rests upon the plaintiff to maintain both the allegations of malice and want of probable cause.² It will be sufficient for you to find any disputed fact proved if it be supported by a preponderance of the evidence.³

¹ See Cooley on Torts, 208 (181).

² Cooley on Torts, 213 (184).

³ Voris, Judge, in *Weber v. Viall*, Summit County Common Pleas. "An action for tort will lie when there is a concurrence of the following circumstances: 1. A suit or proceeding has been instituted without probable cause therefor. 2. The motive in instituting it was malicious. 3. The prosecution has terminated in the acquittal or discharge of the accused." Cooley on Torts, 208 (181).

No. 339. Malicious prosecution—Probable cause defined.—Probable cause is defined to be a reasonable ground for suspicion, supported by circumstances sufficiently strong in this case to warrant an impartial and reasonably cautious man—that is, a man of ordinary caution—in the belief that the plaintiff was guilty of the offense with which he was charged, and set out in detail in the petition in dispute. The true inquiry for you to answer is not what were the facts as to the guilt or innocence of the plaintiff, but what ought the defendant have reason to believe in reference thereto at the time he instituted the criminal proceedings and caused the arrest of the plaintiff.¹

So we say to you, that in determining whether the defendant had probable cause or not, you should consider the

¹ The burden of proof to show want of probable cause rests upon the plaintiff. Cooley on Torts, 213 (184); and will not be inferred from mere failure of the prosecution. *Id.*

question in reference to the facts and circumstances relating thereto, and which influenced him in causing the arrest and preferring the charges, as they were known, and as they reasonably appeared to be at the time, and not by the facts and circumstances as they have been developed since.²

If you find there was probable cause, as thus defined, then you need go no further, and your verdict should be for the defendant; but if you should find from the evidence that the defendant maliciously caused the arrest and preferred the charges against the plaintiff, without probable cause to believe that he was guilty of the offense alleged against him, then you should find for the plaintiff. If you believe from the facts and circumstances proved on the trial, that the defendant had not probable cause as defined, and that he did prefer the charges alleged in the petition and thereby caused the arrest and prosecution of the plaintiff, then you may infer malice from such want of probable cause.³ But this inference is not conclusive, and must be considered in relation to the other evidence submitted to you bearing upon this issue,⁴ so you are to take into consideration all the circumstances given you in evidence relating to this branch of the case in determining whether defendant was actuated by malice or not, and you should be controlled by the preponderance of the evidence.⁵

In common acceptance, malice means ill-will against a person, or express malice, but in the legal sense it denotes a wrongful act done intentionally and without just cause.⁶

² Cooley on Torts, 211 (182) notes 3 and 4.

³ Cooley on Torts, 214 (185); Holliday v. Sterling, 62 Mo. 321; Harkrader v. Moore, 44 Cal. 144; Roy v. Goings, 112 Ill. 662.

⁴ Cooley on Torts, 214 (185) and cases cited.

⁵ See Cooley on Torts, 214 (185). The burden is upon plaintiff to prove malice, Cooley on Torts, 214; Jordan v. R. R. 81 Ala. 220; Hinson v. Powell, 109 N. C. 534.

⁶ Voris, Judge, in Weber v. Viall, Summit County Common Pleas. *Probable cause* is a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a belief that the person accused is guilty. Ash v. Marlow, 20 O. 119. It depends upon the defendant's actual and reasonable belief. White v. Tucker, 16 O. S. 468, 470. Want of probable cause must be shown—the fact of acquittal does not show it; John v. Bridgman, 27 O. S. 22, 39. Want of probable cause, without malice, is not sufficient to authorize the action. Emerson v. Cochran, 111 Pa. St. 619. As evidence of malice the question of probable cause is wholly for the jury. Hicks v. Faulkner, L. R. 8 Q. B. D. 167; Quartz Hill Co. v. Eyre, L. R. 11 Q. B. D. 674. If facts are disputed, the question is for the jury; if undisputed, for the Court. Cooley on Torts, 209 (181). "It is generally the duty of the Court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to proof of probable cause or that they do not," Stewart v. Sonneborn, 98 U. S. 187.

No. 340. Advice of counsel.—The defendant has interposed the defense that he acted in good faith, and upon the advice of a reputable attorney. As to this defense you are instructed that the advice of counsel constitutes a defense to this action.¹ If the defendant gave to his attorney a full and honest presentation of the facts bearing upon the guilt or innocence of the accused within his knowledge, or which by reasonable diligence could be ascertained by him, and which he has reasonable cause for believing he was able to prove, if the defendant acted in good faith and in accordance with the attorney's advice, it would make no difference whether the attorney was mistaken in his opinion and belief as to the existence of probable cause, or whether the facts communicated to the counsel constituted the offense (embezzlement) or not. The mistakes or errors of the counsel, so consulted, can not lay the foundation for damage against the defendant, if in other respects he is not liable under the instructions just given to you.²

¹ Barlight v. Tammany, 38 Am. St. 856; Johnson v. Miller, 82 Ia. 693; Jaggard on Torts, p. 621. "A prudent man is therefore expected to take such advice (of counsel); and when he does so and places all the facts before his counsel, and acts upon his opinion, proof of the fact makes out a case of probable cause," etc. Cooley on Torts, 212.

² Voris, Judge, in Weber v. Viall, Summit County Common Pleas. All facts must have been communicated, 20 O. 119; 4 W. L. B. 1107; 16 O. S. 468; 30 W. L. B. 120; see Jaggard on Torts, 621. It is a question for the jury whether he acted *bona fide* on the opinion, believing that he had a cause of action. Cooley on Torts, 212 (No. 184), note 2.

No. 341. Effect of discharge by examining magistrate.—The fact that the examining magistrate discharged the plaintiff because he did not find him guilty of the charge on which he was arrested, and the failure of the defendant to further prosecute the case, would be *prima facie* evidence that the criminal prosecution and arrest was without probable cause, and not conclusive evidence thereof.¹ By *prima facie* evidence it is meant such evidence as creates a presumption that these facts are established by it in the absence of any evidence to the contrary. In other words, it is of sufficient weight to establish the disputed facts until they are rebutted or overcome by evidence to the contrary. But this presumption must yield to the weight of the evidence submitted to you, taking the whole of it.²

¹ Parkhurst v. Masteller, 57 Ia. 474; Hale v. Boylen, 22 W. Va. 234; Barber v. Gould, 20 Hun 446; Sharpe v. Johnston, 76 Mo. 660.

² Voris, Judge, in Weber v. Viall, Summit County Common Pleas. The record of the magistrate is evidence at least to show the facts of the discharge of the plaintiff. John v. Bridgman, 27 O. S. 22; Cooley on Torts, 213. It is not such evidence as will alone sustain an action for malicious prosecution. Thorpe v. Balliett, 25 Ill. 339.

No. 342. The prosecution must have terminated.—You are instructed that before the plaintiff can recover for the malicious prosecution of a criminal charge, it must appear from the evidence that the prosecution is at an end; and it must also appear that the plaintiff was acquitted of the charge.¹

The defendant having had his day in court in the trial of the charge complained of, it is but reasonable to require that he shall, by the result of the trial, show the criminal charge to be untrue before he can prosecute another action on the ground that such charge was maliciously made.²

¹ *Fortman v. Rottier*, 8 O. S. 550; *Cooley on Torts*, 215 (186); *Cardinal v. Smith*, 109 Mass. 159; *O'Brien v. Barry*, 106 Mass. 300.

² *Id.* As to what kind of a determination will be sufficient to found suit on, see *Jaggard on Torts*, 610-11; *Cooley on Torts*, 215 (186).

No. 343. Measure of damages.—If you find the issues for the plaintiff, he will be entitled to recover compensatory damages at least. Compensatory damages with reference to this subject means such sum as in your judgment, guided by the evidence, the plaintiff ought to receive for the injuries caused by the wrongful acts charged in the petition, and that you can fairly say from the evidence was the direct and ordinary result thereof to his reputation on account of mental suffering of the plaintiff, if such you find, and you may include as compensatory damages such amount as he was compelled to pay in the defense of the criminal action, and for reasonable time lost by reason of the arrest, and the defense he was required to make. You may also include reasonable counsel fees incurred by the plaintiff in the prosecution of this case. It is a matter very much in the discretion of the jury, but this discretion must be exercised reasonably, so as to compensate for the injury actually sustained and nothing more, unless you find this a case for exemplary damages.

But if you find from the evidence that in committing the wrongs complained of it involved the ingredients of actual malice, intentional insult, and oppression on the part of the defendant, and the plaintiff had conducted himself in a reasonable manner under the circumstances, you may go beyond the rule of mere compensation and award exemplary or punitive damages; that is, such damages as will compensate him for the wrong done, and to punish the defendant, and to furnish an example to deter others.

If you find this a case that warrants exemplary damages, the law fixes no limit to your discretion in that behalf as to the amount, except that it requires at your hands that your discretion in that respect should be fairly, reasonably, judi-

ciously and impartially exercised. It should be exercised without feeling, resentment or hasty consideration. And what, under all the circumstances, should be reasonable punishment is the true test.

Nye, Judge, in *Weber v. Viall*, Summit County Common Pleas.

No. 344. Malicious injunction—Probable cause for commencing.—The mere commencing of said suit by the defendants against the plaintiffs, and obtaining said injunction against the plaintiffs, would not, and does not, give the plaintiffs a right to maintain an action against the defendants for malicious prosecution and for damages. In addition to that, the plaintiffs must satisfy you by a preponderance of evidence that the said injunction was obtained by the defendants maliciously, and without probable or reasonable cause. These two points you are to decide as reasonable men, upon the evidence. Probable cause for the obtaining said injunction is such a state of facts, known to and influencing the defendants, as would lead a man of ordinary caution and prudence, acting conscientiously, impartially and reasonably, and without prejudice, upon the facts within the parties knowledge, to believe or entertain a strong suspicion that they had the right to obtain and maintain the injunction. If you find that the defendants in this matter acted upon a reasonable ground of suspicion, that the plaintiffs had no right on said premises, while they, the defendants, had full right, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that defendants had a right to obtain and maintain said injunction, then they may find that there was probable cause for obtaining said injunction.

Probable cause does not depend upon the actual state of the case, but upon the reasonable belief of the defendants that they had a right to obtain and maintain said injunction; but this belief will not constitute a defense to this action, if all the circumstances under which defendants acted clearly show that there was no probable cause for their acts in this behalf, and that their belief was groundless and could not have been formed without the grossest ignorance and negligence. That is to say, taking into consideration all the facts relating to and going to make up the claim of title of plaintiffs in said twenty-three acres, which was known to the plaintiffs, did they honestly believe, and had they reason to believe that plaintiffs had no title to any interest in said twenty-three acres that gave the right to open mines thereon and mine coal? If they did so believe and had reason so

to believe from the facts of which they had knowledge, then you will find for the defendants on this cause of action. Otherwise you will proceed next to the question of malice.

Samuel F. Hunter, Judge, in *Newark Coal Co. v. Upson*, 40 O. S. 17. Approved. For interesting and instructive case and note on subject, see *Williams v. Hunter*, 14 Am. Dec. 597, 601; *Cooley on Torts*, 187.

No action can be brought to recover damages for the malicious prosecution of a civil suit where no rights of the plaintiff have been violated by seizure of property or invasion of liberty. *Bartholomew v. Met. Life Ins. Co.*, 1 Oh. Dec. 267. (Hamilton, Judge, Cuyahoga C. P.)

MALPRACTICE.

No. 345. Care required of a physician.—You are instructed that a surgeon or physician who offers his services to the public that he impliedly agrees with those who employ him that he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by persons engaged in that profession, sufficient to qualify him to engage in that profession. A surgeon assumes to exercise the ordinary care and skill of his profession, and is liable for injuries resulting from his failure to do so.¹

The implied contract which the physician or surgeon thus enters into does not extend to an agreement that he will cure, but only that he will employ such reasonable skill and diligence as are ordinarily exercised in his profession by physicians. The law does not, however, require the highest degree of skill and science. The standard must be a practical and attainable one.²

He does not undertake for extraordinary care or extraordinary diligence any more than he does for uncommon skill.

In stipulating to exert his skill and apply his diligence and care, he contracts to use his best judgment.³

¹ *Geiselman v. Scott*, 25 O. S. 86; *Jaggard on Torts*, 910; *Cooley on Torts*, 778 (649).

² *Jaggard on Torts*, 912; *Cooley on Torts*, 778 (649).

³ *Leighton v. Sargent*, 27 N. H. 460. "As the promise is not different in the case of the physician and surgeon from what it is in the case of the attorney, etc., one general rule may be given." *Cooley on Torts*, 777 (648).

No. 346. Contributory negligence of patient.—If you shall find that the defendant directed the plaintiff to observe absolute rest as part of the treatment to said foot, and that direction was such as a surgeon or physician of ordinary skill would adopt or sanction, and the plaintiff negligently failed

to observe such direction, or purposely disobeyed the same, and that such neglect or disobedience approximately contributed to the injuries of which he complains, he can not recover in this action, although he may prove that the defendant's negligence and want of skill also contributed to the injury. This grows out of the doctrine that a party who has directly, by his own negligence or disregard of duty, contributed to bring an injury upon himself, can not hold other parties who have also contributed to the same responsible for any part thereof, nor does it make any difference that one of the parties contributed in a much greater degree than the other; the injured party must not have contributed at all.

Approved in *Geiselman v. Scott*, 25 O. S. 86.

MARRIAGE.

No. 347. What constitutes marriage.—In the case of *Stowell B. Dudley v. Lucius M. Warren, et al.* (title in supreme court), the trial court refused to give certain requests as to what constitutes a valid marriage, and the circuit court reversed the trial court for error in its action in refusing requests, holding that:

"The court erred in refusing to charge the jury as requested by the plaintiffs, that, in determining the fact whether M. W. and E. W. were husband and wife, the jury are not authorized to determine that question upon the evidence of repute alone, but are to determine it by all the evidence submitted to them by the court, giving to all of such evidence such weight as in their judgment it is entitled to."

The judgment of the circuit court was affirmed by the supreme court without report.¹ We give the requests which were refused by the trial court, and which should have been given.

"If the jury find that E. W. and M. W. (openly and mutually entered into a contract to become husband and wife, and thereafter) cohabited together through a series of years as man and wife, that E. took and bore the name of W. in the communities in which they resided together, that the children of E. were deemed by M. W. to be his children, and were acknowledged by him to be such; that M. W. bore himself towards said children as a father; that they were educated,

¹ See 27 W. L. B. 272.

supported, and provided for by him as his children; if the jury further find that E. and M. conducted themselves toward each other as man and wife, and that the relations between them were apparently respectable and orderly, then a presumption of marriage between the parties arises, and these circumstances are sufficient to warrant an inference by the jury of a marriage between E. and M. W.

“In determining the fact whether M. W. and E. W. were husband and wife, the jury are not authorized to determine that question upon the evidence of repute alone, but are to determine it by all the evidence submitted to them by the court, giving to all of such evidence such weight as in their judgment it may be entitled.

“To constitute a valid marriage in the State of Ohio no ceremony or form of celebration of marriage is required.

“In the State of Ohio the mutual consents of the parties then to become husband and wife, interchanged between themselves and followed by cohabitation, is sufficient to constitute a marriage.

“It is not necessary in order to prove a marriage that an actual exchange of consents be proven to have taken place between the parties, but the jury may presume that consents were exchanged if the relations existing between a man and woman are apparently matrimonial.”²

² The part of the charge inserted in parenthesis probably cures a defect in the request and under *Carmichael v. State*, 12 O. S. 553, is good. See *Johnson v. Dudley*, 4 Oh. Dec. 243, 248, holding that where parties originally came together under a void contract, the marriage may be proved by acts of recognition, cohabitation, birth of children.

No. 348. What constitutes marriage.—You are all aware of the usual and ordinary form by which marriages are celebrated, and of such marriages there is little trouble as to proof. But while marriages are usually celebrated in this formal manner, the law says that marriages may be consummated without such formal ceremony, and if the necessary requisites exist to constitute such marriages, then it is a marriage, a good and binding one. How may a marriage be consummated without the usual form? I say to you if a man and woman agree to be husband and wife, and live together as husband and wife, hold themselves out to the world as husband and wife, and thereby acquire the reputation in the community as being husband and wife, the law recognizes them as husband and wife, though there never was any formal ceremony—that is, the law says that marriage is a civil contract, and that a man and woman may between themselves enter into such a contract, and if they do so enter into such a

contract and live together as husband and wife, the law recognizes them as legally husband and wife, and children born to them would be legitimate children.¹

"A simple agreement between one man and one woman, who may lawfully so contract, that they will take one another as husband and wife thenceforth, and that they will sustain this relation thenceforth so long as they both shall live, with the mutual understanding that neither one nor both can rescind the contract or destroy the relation followed by cohabitation; when they do this, they are married. And their marriage is just and valid in Ohio, as though a chime of bells played a wedding march, and a half dozen bishops and clergymen assisted at the celebration before a thousand people."²

¹ E. P. Green, Judge, in *Stowell B. Dudley v. Lucius M. Warren*, Supreme Court, No. 2871.

² Approved in *State v. Miller*, 12 O. C. C. 62, 66.

There is no subject fraught with so much uncertainty as to what constitutes a valid marriage. Blackstone says: "Any contract made, *per verba de presenti* (by words of the present time), or by words in the present tense, and in case of cohabitation *per verba de futuro* also (by words of future acceptance) between persons able to contract, was before the late act deemed a valid marriage to many purposes, and the parties might be compelled in the spiritual courts to celebrate it in *facie ecclesiae*."

Kent says: "No peculiar ceremonies are requisite by the common law to the valid celebration of the marriage. The consent of the parties is all that is required, and as marriage is said to be a contract *jure gentium* (by the law of nations), that consent is all that is required by natural or public law." *Nuptias non concubitus, sed consensus facit*. ("Consent, not consummation, maketh the marriage.") "This (says Kent) is the language of the common law and canon law, and of common reason." This language would indicate, therefore, that consent merely is sufficient to constitute a marriage, and that if parties consent and then cohabit, that that constitutes marriage.

Blackstone's language indicates that consent by words of the present tense, without a formal ceremony, would constitute a lawful marriage, and as would also by words of future acceptance, followed by cohabitation. And Kent's Commentaries seem to agree with that law. He says (p. 86, 2 Vol.): "If the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by cohabitation, or consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary, and which the parties (being competent as to age and consent) can not dissolve, and it is equally binding as if made in *facie ecclesiae*." This was the doctrine of the common law, and also of the canon law, which governed marriages in England prior to the marriage act of 26 George II.

There seemed to have been considerable conflict between the civil and ecclesiastic authorities in some of the English cases, the intervention of a priest and a formal ceremony being assumed to be a material circumstance, while on the contrary it was considered in other cases that a promise to marry followed by cohabitation, and where there was no illicit intercourse, and it was perfectly clear that a marriage was intended, was a valid marriage. Shelford on Marriage and D., 29, 989.

Again the rule of the common law seems to have been that it was not necessary that the consent should have been given in the presence of a clergyman in order to give it validity, though it was considered a very becoming practice, and suitable to the solemnity of the occasion. The consent of the

parties could have been declared before a magistrate, or simply before witnesses, or subsequently confessed or acknowledged, or the marriage could have been inferred from continual cohabitation and reputation as husband and wife, except in cases of civil actions for adultery, or in public prosecutions for bigamy or adultery, in which cases actual proof of the marriage was required. Kent's Com., p. 88.

Blackstone, it will be remembered, says that consent in words of the present tense, or acceptance in the future, followed by cohabitation, for many purposes constituted a valid marriage. This statement of Blackstone was very thoroughly considered in Ohio in the case of *Duncan v. Duncan*, 10 O. S. 186, in which Brinkerhoff, C. J., said: "What these many purposes for which a marriage *per verba de futuro* were valid were, does not seem very clear; and whatever they might have been, it seems now to be pretty well settled that they did not embrace a right to dower on the part of the wife, not the right to administer on his estate, or to her property, on the part of the husband, nor the legitimacy of the offspring, nor the avoiding of a subsequent marriage pending the first."

This view by the Ohio Supreme Court is supported too by some of the old English cases. So that after all, with all of the uncertainty which seems to exist in the English law, and the looseness of the common law on this subject, it seems that although we many times see the statement that cohabitation will constitute marriage, or will evidence marriage, even though it did, there were none of the usual incidents or rights consequent upon such marriage, so that there would be really no marriage without some sort of a formal ceremony. And the statement is made in a note to Kent's Commentaries that "if it was held by the House of Lords that by the law of England, even before the marriage act, a contract by words in the future was never a valid contract of marriage; that the civil contract and the religious ceremony were both necessary to a perfect marriage by the common law." Citing *Catherwood v. Calson*, 13 M. & W. 261.

In another note in Kent, p. 87, citing the case of *Beamish v. Beamish*, 9 H. L. C. 274, it is said: "In England it is settled that to constitute a valid marriage by the common law, it must have been celebrated by a clergyman in holy orders."

In the case of *Holz v. Dick*, 42 O. S. 23, the parties were married in due form of law but without the consent of the parents, and it was held that where such a marriage was followed by cohabitation after the age of consent, it then constitutes a valid marriage. A marriage good at common law is good unless the statute contains express words of nullity. 12 O. S. 555. A marriage not in accordance with form, but where they openly and mutually consent to a contract of present marriage, and thereafter cohabit, constitutes a marriage. *Carmichael v. State*, 12 O. S. 553. See *Johnson v. Dudley*, 4 Oh. Dec. 243, 249.

No. 349. Legitimacy of children.—In order to make children of parents who have not been formally married legitimate the parents must live together as husband and wife—a man and woman may live together and raise a family of children and such children be illegitimate bastards—it is not the living together and raising of children that make the children legitimate, but it is living together as *husband* and *wife*, and not living together in a state of fornication. It is living together as *husband* and *wife*, holding themselves out to the world as husband and wife, having the reputation in the community of being husband and wife. The law presumes that all children are legitimate, presumes that a man and woman would not live together in a state of fornication, but this presumption will not make children legitimate. To

make them legitimate they must be born to persons living together as husband and wife. If persons live together as husband and wife, holding themselves out to the world as such, and having the reputation of being husband and wife, then the children born to them would be legitimate, although there had been no marriage, no formal ceremony of marriage.

E. P. Green, Judge, in *Dudley v. Warren*, S. C. 2871.

No. 350. Marriage in another state forbidden by laws of such state—Followed by cohabitation in Ohio.—If you find that such marriage did take place in Alabama, it being admitted that such marriage between a master and his slave—it being admitted that E. was at that time the slave of M.—was forbidden by the laws of Alabama and is null and void, yet if they, M. and E., live together as husband and wife in the State of Alabama, and children were born to them, and though these children would be illegitimate and bastards, if you should further find that they afterwards lived in Ohio together as husband and wife, under the rules that I have given you, then the children so born in Alabama would be legitimate by the subsequent marriage of their parents.

E. P. Green, Judge, in *Dudley v. Warren*.

MUNICIPAL CORPORATIONS.

No. 351. Dedication of property for public street—Requisites of—“Three things are necessary to be shown to establish its dedication. The owner must have intended to dedicate the property for a street, and to give up his private rights in it, which are inconsistent with its use as a street by the public at large. And he must have evidenced and carried out this intention by some unequivocal act, such as throwing it open to the public, fencing it out, making or recording a plat showing it marked as a street, selling lots upon such plat, and conveying them by deeds referring to the plat. If you find that the owner so intended to dedicate it as a public street, and carried out such intention by acts necessary for that purpose, then the village council must have accepted the dedication, there being no evidence of any acceptance by the public before the incorporation of the village; and the passage of an ordinance recognizing the street and providing for its occupancy and improvement by the corporation is a sufficient

acceptance of the dedication of the street by the village council, if before that time the owner, on his part, had done all that was necessary to its dedication, as before mentioned."

From *Railway Co. v. Village of Carthage*, 36 O. S. 631. Intention to dedicate express or implied, and acceptance by municipality are essential. *Millikin v. Bowling Green*, 3 Oh. Dec. 204 (C. C.).

No. 352. Interest of abutting owner in street.—If the lands of the plaintiff, mentioned and described, abut upon — Street, he has, in addition to the general interest which the public has in the street, an incidental title to certain facilities, easements, and franchises, one of which is the right of ingress and egress to his lot, which is as much property as the lot itself, and if you find that his lands abut upon — Street, and that this right or easement has been substantially impaired by the defendant in the location and operation of its railroad along the street, if you find it has so done, and that by the location of the railroad track by the defendant in the street in front of his premises, that he has sustained special damage by having the ingress and egress to his lot substantially impaired, you may and should take this into consideration in determining the amount to which he would be entitled.

From *Railroad Co. v. Stubbings*, Supreme Court, unreported, No. 2467. The interest of an abutting owner is a property right in the nature of an incorporeal hereditament, protected as property by the constitution. *Crawford v. Delaware*, 7 O. S. 459; *Street Ry. v. Cumminsville*, 14 O. S. 523. An abutter's right of access is property, *McNulta v. Ralston*, 5 O. C. C. 330. "An abutting property owner on a public street of a municipality has a right and interest in the street, in the nature of an easement, appurtenant to his lot, and as much his private property as the abutting lot itself." *Pratt, Judge, in Toledo Bending Co. v. Mfg., etc., Co.*, 3 Oh. Dec. 430.

No. 353. Establishment of street by general use.—In determining the lines and location of — Street, adjoining the property of plaintiff, it is not necessary that legal proceedings should be shown to have been had to establish this street, but if you find from the testimony that the same had been in general use as a street in the City of — for a public road for a period of 21 years prior to the time the same was occupied and used by the defendant, as claimed in the petition, if you find it was so used and occupied by the defendant, this would constitute in law an establishing of the same as a public street, and would entitle the plaintiff to all the rights and the same rights therein as though the same had been regularly laid out and established by the proper authorities. And in determining the location of — Street, you should consider only the evidence relating to the use thereof by the public, so far and to such an extent that it is proven that the same

was actually and necessarily used and traveled by the public, and the fact that the public travel was diverted to the water of the canal for the mere purpose and convenience as a watering place for stock would not necessarily establish the laying out of the street upon that portion of the traveled track that was so used and only so used.

From *Railroad Co. v. Stubbings*, Supreme Court, unreported, No. 2467.

No. 354. Municipal corporation — Streets—When may be improved.—Streets are essentially permanent physical conditions of city existence, and, when appropriated to the public as part of a street system, imply that as fast as the needs of the public require they will be improved in a manner adequate to reasonably meet the public requirements; but it would be unwise and frequently very oppressive to make such improvements faster than the ability of the abutting owners would make practical, and this is especially true as the more expensive permanent street improvements are paid for largely by local assessments. The fact that the municipality reasonably delays making or authorizing the expensive improvements is not to be treated as a waiver on its part of its right or intention to properly improve the street when it becomes, in its discretion, reasonably proper so to do, and as the needs of the public require; and what is reasonable is wholly within the discretion of the municipal authorities, so long as such discretion is reasonably exercised under the circumstances of the given case and within the provisions of the statute.

Voris, Judge, in *Sanford v. The City of Akron*, Summit County Common Pleas. Affirmed by Circuit Court, April term, 1896. A citizen can not control the method of improvement, *Parsons v. Columbus*, 50 O. S. 460.

No. 355. Streets—Care of by municipality—Streets includes what—City not insurer.—The law requires that the City of —, being a municipal corporation, shall have the care, supervision and control of the streets, and shall cause them to be kept open and in repair, and free from nuisance. This obligation includes, of course, as a part of the streets, the sidewalks and crosswalks, and, therefore, imposes upon the city the duty of keeping the sidewalks and crosswalks open and in repair, and in a reasonably safe and suitable condition for pedestrians passing along the same. This requires a reasonable vigilance in view of all the surroundings, and does not exact or require that which is impracticable. When the municipal authorities have done that which is reasonable in this regard, they have discharged the entire obligation imposed by the law. It is to be said also that the city is not

bound at all hazards to have knowledge of defects in sidewalks. The city is not an insurer of the safety of its public ways and sidewalks, or of the lives and limbs of persons passing over and along them. It is the duty of the city to exercise ordinary care and prudence in the taking care of its streets, and this includes sidewalks; and by ordinary care I mean that degree of care which persons, which individuals of ordinary prudence, are accustomed to use and employ under the same or similar circumstances, in order to conduct the enterprise in which they are engaged to a safe and successful termination, having due regard for the rights of others, and for the objects to be accomplished. In general terms, then, such is the duty of the city in the care, supervision, control, and maintenance of streets.

Carlos M. Stone, Judge, in *City of Cleveland v. Storer*, S. C. 4422. See Cooley on Torts, 746 (625). A street includes sidewalks. Dillon's Municipal Corporations, Sec. 780, n. The city is bound to see that the sidewalk conforms to the grade of the street. *Toledo v. Higgins*, 5 Oh. Dec. 485.

No. 356. Duty of pedestrians upon streets.—On the other hand, it was the duty of the plaintiff as a pedestrian upon the street to exercise ordinary care in passing along the street and over this crossing—over the crosswalk—and the same rule as to ordinary care in this instance means precisely what it means in the other. He is to exercise that degree of care that men of ordinary prudence are accustomed to use and employ. It was then his right to go along the street in reliance that the city had properly discharged its duty; he had a right to pass along the street in the belief that the city had performed its duty, and that its sidewalk was in a reasonable and suitable condition for him to pass over. That reasonable diligence on the part of the passerby along the sidewalk doesn't require that he shall be on the alert every moment searching for a defect here or there. It doesn't mean that at all; nor does it mean that he may shut his eyes and take his chances on any possible condition of things. It is not that. It is relying upon the city's keeping its streets in a reasonably fair condition. He may walk along relying upon that condition of things, that supposed condition of things; he may proceed upon the theory that the sidewalk is in a reasonably safe condition, using that care and that discretion that prudent men are accustomed to use in passing along a highway.

Carlos M. Stone, in *City of Cleveland v. Storer*, S. C. 4422. Police power of city as to cross streets and crossings. Dillon's Municipal Corporations, Sec. 393.

No. 357. Defective street becomes a nuisance when.—

Now, the word "nuisance" in this provision of our statute I choose to define in these words: A nuisance is something done or omitted to be done which has the effect of prejudicially and unwarrantably affecting the rights of another person, and works a damage or injury to such other person. If this sidewalk had become out of repair, was defective in the particulars claimed, if it had become dangerous, unsafe to cross over, maintained there by the city with knowledge of its defects and dangerous character, then that was the maintaining of a nuisance within the meaning of the law, and if a person was injured without fault on his part, under such circumstances, he would have a right of action predicated upon the nuisance so maintained.

Carlos M. Stone, Judge, in *City of Cleveland v. Storer*, S. C. 4422. See different form, No. 567, post. What are nuisances and power and duty of city to abate. *Dillon's Municipal Corporations*, Sec. 374 and n.

No. 358. Notice of defects in streets.—If you find the city had actual notice of this defect, or if such defect had existed for such a period of time as that the city, in the exercise of reasonable care, ought to have known it, etc., a word upon that proposition: If there occurs a defect in a street upon such short notice or under such circumstances as that the city had no knowledge of it, and in the exercise of ordinary care could not know it—could not be expected to know it—then no liability arises against the city for that reason. So, it is requisite as one of the things to be established, either that the city had actual notice of the defect, or that it had existed for such a length of time and under such circumstances and surroundings as, in the exercise of ordinary care, it must be held to have known it, ought to have known it, because it was bound to have known it by reason of its long existence. Notice to an officer of the city, charged with the duty of looking after these things is notice to the city. The city acts through its properly constituted officers and agents. Some have charge of one department of the city government, and some have charge of others, and so I say, notice to a duly appointed officer, whose duty it is to look after sidewalks and crosswalks, whose duty it is to see that they are kept in repair, notice to such an officer is notice to the city. And so it is notice to the municipality where the defective condition has existed for such a period of time as that, in the exercise of ordinary care, ought to have known it. That is what is known as constructive notice. It is constructive notice as distinguished from actual notice.

Carlos M. Stone, Judge, in *City of Cleveland v. Storer*, S. C. 4422. As to what is notice to city of defect, see *City of Lafayette v. Allen*, 81 Ind. 166. If a city fails to keep its streets in safe condition for public use, it will be liable for any injury caused thereby. *Dillon's Municipal Corporations*, Sec. 980.

No. 359. Instruction as to knowledge of city—Another form.—You will first consider whether the sidewalk was out of repair and in such a condition as to be dangerous; then whether the city knew it. If the sidewalk was out of repair and in a damaged and defective condition, and had been for a sufficient length of time so that the city might be presumed to know of it, then the city had notice. It is not necessary to show positively that some one went to the official whose duty it was to look after these streets and sidewalks and told him about the dangerous condition of these sidewalks. But you must find, if you find there was a dangerous sidewalk, that it was so apparent that it might be observed by persons passing over it in that condition, and that it had been so for a sufficient length of time, so that it is fair to presume that the city and its officials in the course of their duty, in its care of the streets, should have known of it and had time to repair it, before you may find that the city had notice.

Gorman, Judge, in *City of Toledo v. Wilhelmena Clopeck*, Supreme Court, unreported. Judgment affirmed.

No. 360. Streets—Liability of city for mere slipperiness.—The city is not liable for the mere slipperiness of the sidewalk. If this crosswalk was in a reasonable state of repair, so that you are able to say that the city was without fault in the premises, then there was no negligence on the part of the city in maintaining this crosswalk or plate in the condition that it was in, and this accident nevertheless happened, if it happened because of the slippery character of the walk, resulting from this slight fall of snow during the night previous, or from sleet, or an icy condition of the walk, the plaintiff would not be entitled to recover. But if this fall was due to the fault of this sidewalk—due to the faulty condition of it, rather—if the city was negligent in the care of it, if it had permitted it to become out of repair, to become unsafe and dangerous, and this fall was the result of that condition, and the plaintiff, without fault, received this fall because of that condition of things, then he would be entitled to recover, we think, even though that dangerous condition was enhanced by the fact that snow had fallen upon it the night before. In other words, the plaintiff is not prevented from recovering in this action, even though the slippery condition of the sidewalk incidentally caused by the fall of the

snow added to the condition of things there, made it more dangerous. He is not prevented from maintaining his action if the jury find from the testimony in this case that the fall was due to the defective condition of the sidewalk, and without which defect the accident would not have happened, and if you further find, as I have already indicated, that the city had knowledge of the defective character of the sidewalk, or that it existed for such a length of time as, in the exercise of ordinary care, ought to have known it, the city would be held liable.

Carlos M. Stone, Judge, in *City of Cleveland v. Storer*, S. C. 4422. As to liability for mere slipperiness, see *Chase v. Cleveland*, 44 O. S. 505; *Dillon on Mun. Corp.* Sec. 1006.

The court, in the 44th O. S. 514, upon this subject of ice and snow, says: "In all northern cities and towns storms of snow and sleet, producing ice and resulting in slippery walks, are of frequent and constant recurrence during the winter season, and accidents of the character complained of are also frequent. Such dangers are apt to exist in many places at the same time, and at points widely separated from one another. They appear at many points to-day, disappear to-morrow, and like dangers appear at other places the next day. They are affected by changes of weather, which are likely to occur at any time, and frequently many times within a few hours. . . . To effectually provide against dangers from this source would require a large special force involving enormous expense."

A city is not liable to one who slipped upon an icy sidewalk. *Bretsh v. Toledo*, 1 N. P. 210.

No. 361. Streets—Injury from ridge of ice or snow by the side of street railroad track—Liability of city for.—

Now, it is also a well-settled rule that the city is not liable for any injury which is caused by the mere slipperiness of its streets, caused by ice or snow upon the surface of the street. This is a situation of things which is necessarily incident to winter weather, and is liable to occur during winter at any time and upon any street; and that is a condition of things that the public and persons traveling upon the street know and are bound to know, and to take into consideration; and it would be an unreasonable burden to impose upon the city to see that its streets at all times during the winter, in all places, were free from mere slipperiness. But if ice or snow is allowed to accumulate upon the street to such an extent as to become a serious and noticeable obstruction to ordinary travel upon the street, and the city, by its officers or agents, acquired notice or knowledge of such obstruction, and if, after such knowledge or notice, it is practicable, considering the means at its command, considering the time during which this alleged obstruction existed, and considering everything, if it is practicable for the city to remove these obstructions after such knowledge or notice, then it would be liable for an

injury caused by such obstruction; and of course, in determining whether it is practicable or not, the jury will have to take into consideration the extent of such obstruction, and of similar obstructions throughout the city, and the means at the command of the city, and all the circumstances in evidence.

Now, gentlemen, it will be your duty to examine the evidence in this case carefully, and determine just what the facts are. You will inquire whether there was a ridge of snow or ice upon the side of this street railroad track, and whether the plaintiff's horse slipped on that ridge of ice or snow—whether that was the cause of the horse's falling; and whether that ridge of snow or ice, if it existed, was of such a character and of such an extent as to be an obstruction to ordinary travel upon the street. Was it a noticeable obstruction? Did it materially interfere with the ordinary travel upon the street? You will ascertain, if you find that such an obstruction existed as I have described, whether the city knew of it, or whether, by the exercise of ordinary care and vigilance, ought to have known of it. You may consider the length of time the obstruction had existed, if at all, in substantially the same condition it was in at the time of the accident.

Of course, if this ridge, assuming that you find that such a ridge was there, if it was substantially caused by a recent fall of snow or a recent change in the state of the weather—so recent that it could not reasonably be expected that the city would have the opportunity or the means or the ability to remove this as well as all similar obstructions throughout its corporate limits—then the city is not liable. You must look at all these matters as reasonable men, in the light of all the circumstances, applying to them your best judgment and your experience.

Isaac P. Pugsley, Judge, in *City of Toledo v. Wellener*, Supreme Court, No. 2652. Judgments affirmed. It is the duty of a city to use reasonable diligence in keeping its streets and walks free of snow and ice. *Dillon's Municipal Corporations*, Sec. 1006. Failure of the city to look after removal of snow and ice on its streets and sidewalks may be regarded as a wrongful act. *McKellar v. Detroit*, 57 Mich. 158.

No. 362. Liability of municipality for injury resulting to traveler upon stone in street.—It is the duty of the defendant corporation to use reasonable care, caution, and supervision to keep its streets in a safe condition for the ordinary modes of travel, at night as well as by day, and if it fails to do so it is liable for injuries sustained in consequence of such failure, providing the party injured was exercising reasonable care and caution. Therefore, it becomes

a question of fact for you to determine in this case as to whether or not this defendant was negligent in the way the street was left at the time of the accident. If you find from the evidence that the plaintiff, while driving on the street, could see or was actually aware, because of the electric lights or otherwise, that the stone in question was in the street and obstructed it, nevertheless he had the right to continue to proceed on his way, but it was his duty in doing so to use ordinary care to avoid such obstructions or danger liable to be caused thereby, and if, while so doing, in the exercise of ordinary care, he drove against such obstruction and was thrown from his buggy and injured, the defendant would not be relieved from responsibility for such injury by reason of such attempt or acts of the plaintiff in and about attempting to proceed in his way, but in doing so he must have exercised ordinary care; failing in this, he can not recover, even should you find that the defendant was guilty of negligence. . . .

A municipal corporation is not liable for every accident that may occur from obstructions or defects in its streets. Its officers are not required to do everything that human energy and ingenuity can possibly do to prevent the happening of accidents or injury to citizens. If it exercise ordinary and reasonable care in that regard, they have discharged their duty to the public.

Gillmer, Judge, in *Rosser v. Village of Girard*, Trumbull County.

No. 363. Municipal corporations—Duty of, as to sidewalks—Liability for injuries therefrom.—The court says to you as matter of law that it was the duty of the defendant, by its proper officers and agents, to see that the sidewalks in the corporate limits of the city were in a reasonably safe condition for persons to travel over in the daytime or in the night season.

A municipal corporation, however, is not liable for every accident that may occur from defects in its sidewalks or streets. Its officers are not required to do everything that human energy and ingenuity can possibly do to prevent the happening of accidents or injuries to a citizen. If it has exercised reasonable care in that regard, and if its streets are in a reasonably safe condition, it has then discharged its duty to the public.

Gillmer, Judge, in *Wallace v. City of Warren*, Trumbull County Common Pleas. City will be liable for defect in street or sidewalk causing injury. *Dillon's Municipal Corporations*, Sec. 1007. But the defect must be the proximate cause, *Id.* A municipality is not an insurer against accidents upon streets, but is held to reasonable care in keeping them free from nuisance. It is not bound to anticipate improbable or unprecedented events. *Village v. Gallagher*, 52 O. S. 183, 187, and cases cited.

No. 364. Same continued — Notice of defects in streets.—The burden is upon the plaintiff to show by a preponderance of the evidence that the defendant had actual or constructive notice of the defect claimed in the street, before recovery can be had. Actual or constructive notice of the defect complained of must be given a sufficient length of time in order to enable it to repair the defect, if any existed.

Constructive notice would be where the defect had existed for such a length of time prior to the alleged injury that the city, in the exercise of ordinary care and diligence, would or should have known of the defect. If it should appear that the city did not know of the particular defect in the walk that caused the injury to plaintiff, but that the sidewalk generally, as is alleged and claimed, was defective, then you are instructed that in order to charge the municipality with notice of the particular defect from its knowledge of the existence of a general one, the first should be of the same character as the latter, or at least so related to it that the particular defect is a usual and concomitant of the general one. To constitute knowledge of the general defect notice of the particular one, they must at least be of the same general character, or the latter a usual concomitant of the former, and substantially at the point or place where the accident occurred.

In this case the court says to you that if you find that the city knew that the particular places across the sidewalk at the point in question were generally loose, or if you find that it knew that the stringers had become rotten so that the nails would easily draw from them, and then you further find that the plaintiff was injured on account of her putting her foot through a hole in the sidewalk, on account of one of these boards that had become loose, on account of the general character of the sidewalk, by reason of the stringers becoming rotten so that they would not hold the nails, then you are instructed that if the injury was caused in this manner, that the city might be chargeable with notice of the defects, although, in fact, it did not know that the particular hole through which the plaintiff put her foot existed at the time. If, however, the general defect known to the city, if one was known, was not of the character to make the sidewalk unsafe, or was of a character totally unlike the one which caused the injury, so that the existence of one would be no presumption of the existence of another, then this would be no such notice as would bind the defendant. . . .

The defendant must have notice before there can be a recovery on the particular defects in the sidewalk which caused the injury to plaintiff.

Gillmer, Judge, in *Wallace v. City of Warren*, Trumbull County Common Pleas. The city is liable after notice if it refuses to act. 53 O. S. 605.

No. 365. Injury from defective sidewalk continued—Duty of city as to keeping sidewalks in repair.—It is the duty of the city to keep public streets and sidewalks in reasonable repair so that they shall not be dangerous to people passing thereon. They should be free from nuisance, and anything dangerous to the public and that interferes with the public convenience and safety is a nuisance.¹ And if a street or sidewalk is in such a condition as to be dangerous to people passing over it, then it is a nuisance and it is one of those things that it is the duty of the city to remedy within a reasonable time after it is known. Upon that, as I have already said, before you can find for the plaintiff you must find that the city knew of this defective condition of the walk, or should have known of its being in that condition and apparent, so that it could be observed by people looking at it or people passing over it, for a sufficient length of time so the city should have known of it and had time to repair it before this time when the plaintiff claims she was injured.

If you find by these facts proof that there was that dangerous condition of the walk there, and it was a walk laid down by the city, in a dangerous condition, and had been in that condition a sufficient length of time so the city knew it, or should have known of it, or had it repaired; if you find the plaintiff was passing along there, and, without any fault of hers, was thrown and injured, before she is entitled to recover her damages from the city for that injury; if you do not find or did not find all those things, then your verdict will be for the defendant and that the plaintiff has no cause of action.²

¹ Municipal corporations are invested with the power and charged with the duty of keeping the streets under their control free from nuisance. R. S., Secs. 1878, 2640; *Zanesville v. Fannan*, 53 O. S. 605; *Cardington v. Fredericks*, 46 O. S. 442-47.

² *Gorman*, Judge, in *City of Toledo v. Clopeck*, Supreme Court, unreported. Judgments affirmed.

No. 366. Injury from defective sidewalks continued—Latent defects—Notice of.—I have been requested by the defendant to give you some certain charges in a certain form, and I will read to you that which seems to me to be proper to be given, and you will receive this as part of your instructions by the court, and as containing the rules applicable to this case:

"A latent defect in a sidewalk is one that does not appear to the eye, or would not appear to be known by a person walking over it. The law does not presume notice to a municipal corporation of a latent defect.

"Before a municipal corporation can be held in damages for injuries caused by a latent defect, the jury must find that the municipal corporation had actual notice of such latent defect.

"The jury must look only to the testimony as to the condition of the walk at the point at which the accident is alleged to have occurred, and must disregard all general statements as to other walks."

Gorman, Judge, given by request in *City of Toledo v. Clopeck*, Supreme Court, unreported. Judgment affirmed January 22, 1895, No. 3207. See ante, No. 346 note.

No. 367. Municipality—Liability for injuries from overflowing sewer.—It is the duty of the city to exercise reasonable care and skill and caution in the construction, maintenance, and management of its sewer system, and if in these respects it is negligent, the city is liable for the acts of such negligence to the person so injured. Yet the city is not liable for extraordinary care or prudence, nor to provide against extraordinary contingencies; what would constitute extraordinary contingencies is a matter of fact to be determined by the jury from the evidence submitted to them. Its liability is no greater than that imposed upon private persons in like circumstances. The city is not to be held by the more stringent rule in that respect than the plaintiffs are for the safety of their own property. In determining whether the plaintiffs were guilty of negligence or not in providing safeguards to prevent backwater from the sewer, and in properly guarding their goods from injury, no higher or more stringent rule is required of them than that of ordinary care and skill and prudence, such as persons of ordinary care and prudence are accustomed to use and employ under the same or similar circumstances, in order to conduct an enterprise in which they are engaged to a safe and successful termination.

Whether the failure of the plaintiffs to put in a backwater valve, if you find such to be the fact, was or was not negligence on their part is to be determined by you, under the rules given you in this charge, from all facts and circumstances proven in the case.

The law presumes a party to know what, by the exercise of reasonable care and prudence, he ought to know under all the circumstances in the case, and this is a case in which this presumption is peculiarly applicable.

Voris, Judge, in *Miller v. Akron*, Summit County Common Pleas. As to liability of city for overflow of sewage on private lands, see *Dillon's Municipal Corporations*, Sec. 1046.

No. 368. Change of grade—Damages—Viewing premises.—You have viewed the premises in question in this case, but you are not to treat what you observe there as evidence; you are not to adopt your own theory or opinion as to the fact of reasonableness or unreasonableness of the extent of the improvements, or whether it was made on or above the ordinary grade, nor as to the value or extent of the injury done. These facts must be determined by the evidence. You were permitted to go and view the premises only for the purpose of enabling you the better to apply the evidence submitted to you.

Voris, Judge, in *Smith v. The City of Akron*.

No. 369. Change of grade—Municipality not liable when.—As a general rule, a municipal corporation is not liable for damages to property abutting upon a street, resulting from the improvement of such street, providing such improvement is made within the scope of the corporation's authority, and without negligence or malice; that is, if reasonably made. The people of Ohio have always been jealous of any encroachment on the rights of an individual. Private property is held inviolate by constitutional provision, but subordinate to the public welfare, and when taken for the public use, a compensation therefor must be made in money. Construed in the light of these instructions to you, this constitutional provision is operative, and should be upheld in cases like the one on trial.

Voris, Judge, in *Smith v. City of Akron*.

No. 370. Same continued—City liable when—Improvements made with reference to established grade.—If, however, it be shown that the city before the construction or making of the plaintiff's improvements, by ordinance duly enacted, established the grade of said street, and had so improved or appropriated the street as to indicate fairly and reasonably that no future change would be required by the city, and the plaintiff, relying upon such corporate acts as a final decision as to the wants of the public, improved her lot in a manner suitable to the established grade, and afterwards her improvements were injured by a change of the grade by the city, the rule just announced¹ could not apply.²

If the plaintiff so made substantial improvements upon her lot with the view of such established grade and level of

¹ Ante, No. 369.

² *City v. Penny*, 21 O. S. 499.

the street, and the city thereafter altered the grade, and dug down the street so as to materially impair the value of such improvements, the city would be liable to her for damages so far as the premises were materially injured thereby, if the evidence brings her within the provisions and limitations of the instructions given you.

No. 371. Same continued—What the statute provides.—The statute provides, however, as a protection to both the owner and the city, that before it can legally proceed to make such improvements as that made upon the street, the council shall declare by resolution the necessity of such improvement, and shall give twenty days notice of its passage to the owners of property abutting upon the improvement; . . . and all plans and profiles relating to the improvements shall be recorded and kept on file in the office of the city engineer or clerk, and open to the inspection of all parties interested, and such owner claiming that he will sustain damage by reason of the improvement shall, within two weeks after the service of the notice, file a claim in writing with the clerk of the corporation, setting forth the amount of damage claimed, together with a general description of the property with respect to which it is claimed the injury will accrue; an owner who fails to so do shall be deemed to have waived the same, and shall be barred from filing a claim or receiving damages.

R. S. Sec. 2515.

No. 372. Change of grade—Effect of failure to file claim for damages.—The law that requires the owner to file his claim for damages is reasonable and founded in sound state policy. This is required among other things to enable the city council to understandingly determine whether it would be expedient to go on with the contemplated improvement, taking into account the amount of money required to be paid for damages, whether the property owners liable to pay the assessment for improvement ought to be burdened by so great an expense, and also to enable it to provide the ways and means therefor. Unless a short day were fixed, the city would be greatly embarrassed and delayed in needful improvements; this would be especially true in rapidly growing cities. But this provision of the statute can not avail the city when it has failed to serve the required notice. If the notice has not been served upon the plaintiff, he would not be barred from prosecuting his claim for damages, nor being considered as having waived the same. But if notice has been properly

served upon the plaintiff, who fails to file his claim in writing for damages within the two weeks required by the statute, the complainant would be barred of the right to recover, unless you find from a preponderance of the evidence that he is relieved therefrom by reason of certain information which was procured from the city engineer.

The plaintiff acting in good faith may rely upon the profiles and surveys on file in the office of the city engineer, which were consulted by him, and upon which he relied in making the improvements. But for such as were kept in the office of which he had no notice, and upon which he did not rely, you are not to consider in any other light than as bearing upon the accuracy of the plans, profiles, and surveys submitted to you in evidence. But they do not lay the foundation for recovery against the city unless you are satisfied from the evidence that the same were adopted by the city council, and this must appear from the records of the proceedings of the council.

If the plaintiff claims to have been misinformed as to the extent of the cut in front of his premises through the officials of the defendant, and it appears that plaintiff went to the office of the city engineer to examine the plans and profiles of the improvement and learned therefrom of the cut to be made in front of his lot, and being unable to obtain the desired information therefrom; or if the plans and profiles were of such a nature as to require one skilled in such work to understand them, and the plaintiff thereupon requested the engineer to give the desired information, so as to enable him to prepare or determine whether he would prepare or not any claim for damages; and the plaintiff was then informed that the cut in front of his premises would not be more than — inches at the east line, and not more than about — feet deep at the west line of his lot, etc., such statement of the city engineer is competent evidence for you to consider in determining whether plaintiff should be deemed to have waived his claim for damages by not filing it within the two weeks provided by statute, and it would be competent if the plaintiff, acting in good faith and knowing nothing to the contrary, relied upon the statement so made by the city engineer, and so relying thereon, did not, and because thereof, file his claim for damages, such failure to file the claim within two weeks required by statute would not thereby necessarily be deemed to have waived the same, nor by reason thereof necessarily be barred from maintaining this action.

Sickness in the family would not excuse the plaintiff from making the inquiry within the two weeks, nor from filing his claim within that time.

This instruction is somewhat changed and modified in language from one given by Judge Voris in *Smith v. City of Akron*, and possibly also in another case with some changes, omitting parts of his charge, so as to make it general in its application.

No. 373. Change of grade—Plans and profiles.—It was the duty of the city to have such a plan and profile on file as would reasonably advise persons of ordinary intelligence of the extent which the proposed improvement would affect the plaintiff's property, but if it so failed to give such information, or gave it in such a manner as required one skilled in such work to understand them, and the plaintiff was not so skilled, then it was competent for the plaintiff to go to the city engineer and seek from him the necessary explanation or information, and to rely upon such explanation and information given in that behalf by the city engineer; and it was competent for the engineer to speak in behalf of the city in giving such information.

Voris, Judge, in *Smith v. City of Akron*.

No. 374. Change of grade—Adopting county road as street.—If you find from a preponderance of the evidence that the City of — adopted as a street of the city the county road, and established the same as such, without change of grade, for more than thirty years,¹ and the plaintiff erected his dwelling-house and other structure, and made his other improvements thereon, and the plaintiff used reasonable care and discretion and judgment in making his improvements, with a view to the future, proper, and reasonable change of grade, and the city caused a change of grade in such street to be made subsequently, which resulted in damage to such improvements, and the change of grade which caused such injuries could not, by ordinary care and discretion, have been anticipated, then the city would be liable for such injuries, if you find in other respects that the plaintiff is entitled to recover.²

¹ Thirty years is not a necessary period of time, but it should be so long as to create a reasonable presumption of the fixed grade.

² Voris, Judge, in *Rhodes v. City of Akron*.

No. 375. Change of grade—Improvement made before grade established is at one's own peril.—If you find from a preponderance of the evidence that, at the time the plaintiff (or his predecessors in title) improved his property, any grade had been established on the street, either by ordinance, or such improvement and appropriation of the street to public use by the authorities of the city as to fairly indicate that the

grade was permanently fixed, and no other change would be required by the city, then the plaintiff (or his predecessors in title) improved his property at his peril, and the plaintiff can not recover unless the present grade upon which the improvement has been made is an unreasonable one, or the street improvement was negligently done and by which the injury complained of was caused.

But if the nature and extent of the improvements and use of the street had not been so indicated or defined by the defendant before the plaintiff (or his predecessors in title) made their improvements, then they would be presumed to have made them at their peril, with reference to such future use or change in the street as the city might reasonably adopt and make, he would not be entitled to recover, unless the city adopt an unreasonable grade and made improvements pursuant thereto, or made its said improvements in such a negligent manner as to have caused the injuries complained of.

Voris, J., in *Rhodes v. City of Akron*, Summit County Common Pleas.

No. 376. Same continued — Rule as to unreasonable grade.—If the street improvements were made subordinate to an unreasonable grade—were unreasonable in their nature under all the circumstances—then the city could not be treated as exempt from liability to the plaintiff to the extent that such unreasonable grade and the improvements so made so injured his property. But in that case the damages should be limited to such only as were caused by the unreasonableness of the grade, and the street improvements made pursuant thereto, and none other, and the extent of damages, if any were caused, by what would have been a reasonable grade, he can not recover.

In determining the question whether the same was reasonable or unreasonable, the date of the establishment of the grade is to be considered, and not the time the plaintiff's improvements were made. And the city starts out with the presumption that its officers have acted rightfully, and this presumption must prevail until the contrary appears from a preponderance of the evidence. The law gives the power and imposes upon the city the duty to pave, improve, and keep in reasonable repair the public streets of the city, and in the exercise of this power, and in the performance of these duties, the law presumes that it has acted rightfully until the contrary appears from the evidence. This presumption of law as to the rightfulness exercised by the public authorities of the city is a mere presumption and may be removed by testimony; it is only to be taken as true until evidence is

received which overcomes it, and when so overcome this presumption is removed and the evidence should then control.

This discretion reposed in the city council as to the exercise of its authority and duties over the public streets of the city can be exercised by no other persons. It is only for the abuse of that discretion that the courts can interfere. In passing upon the question as to whether or not the defendant made his improvements on a reasonable grade, you must gravely consider whether witnesses who have appeared before you, after all the evidence which you have had submitted to you, are any better able to decide this matter than the city council.

If you are satisfied from a preponderance of the evidence that the city has exceeded its authority, and adopted and acted upon an unreasonable grade, you should say so; but we feel like saying to you that it should be done after the most careful deliberation upon your part, and upon satisfactory evidence.

Voris, J., in *Rhodes v. City of Akron*, Summit County Common Pleas.

No. 377. Change of grade—Whether or not premises abutting upon improvements has effected claim for damages.—Whether or not plaintiff's premises did or did not abut on — Street, is a fact to be determined by you from the evidence. In determining this issue, if you find that the lots or premises have been continually owned, used, and occupied as one parcel of land, and for a dwelling-place and domicile for many years, you may consider that customary use and occupation as determining the character of the land, rather than its subdivision into separate parts, and treat the same as an entire parcel of land.

To entitle the plaintiff to recover it is not necessary that the whole of the front of the premises should abut on — Street; but, before the plaintiff can recover for injury affecting ingress and egress to and from his premises, it must appear that the substantial part thereof abuts on — Street. Even though no part thereof abuts on — Street, yet if you find that the defendant wrongfully, negligently, and by reason of the unreasonable grade, excavated up to and against said premises, so as to substantially and obviously injure plaintiff's said premises and improvements thereon, he would be entitled to recover to the extent of the actual injury to the value of his property caused thereby, not, however, including any damages for deprivation of ingress and egress, as before defined, to and from said — Street.

Voris, J., in *Rhodes v. City of Akron*, Summit County Common Pleas.

No. 378. Reasonableness of grade—What should be considered in determining.—In determining the reasonableness or unreasonableness of the grade and improvements of the owner, you should take into account not only the grade of the street in its relation to the locality of the plaintiff's premises, but in its relation to the street as part of the street system, and the relation that said street sustains to this system and the grades thereof. You must consider —— Street in a much broader sense than the mere relation it sustains to the plaintiff's premises or their immediate vicinity. It must be taken with reference to the general uses and purposes to which the street is devoted by the city to the public; nor should this be limited to the mere purpose of traveling thereon; it should be considered with reference to the system of drainage, sewerage, and every reasonable public exigency that may grow out of its use and purpose as one of the public streets of the city, so as to harmonize with its street system.

In determining whether the grade is reasonable or not, a mere difference of opinion on your part with the city council, whether the council exercised official discretion and authority reasonably or not, would not justify you in deciding against the action of the council. There must be something more than mere difference of opinion. You must be able to find from the evidence that the council acted unreasonably, that is, arbitrarily, oppressively, taking into account the improvement as a whole, and its various relations as explained to you, or their official action must stand.

Voris, J., in *Rhodes v. City of Akron*, Summit County Common Pleas.

No. 379. Change of grade—Recovery of interest on damage.—"If the plaintiff sustained any injury by reason of change of grade, it occurred at the time the change was made, and in determining the measure of damages by the differences between the value of improvements before the change of grade and the value of the improvements after the change, you are to consider the values at that time. If you find for the plaintiff in that regard, having assessed a reasonable and just compensation therefor, you will then consider the question of interest on the amount of damages found for the plaintiff, and on that question, if you find that the plaintiff is entitled to damages, then he should be allowed interest thereon from the date of his injuries to his improvements up to the first day of this term."

From *Cincinnati v. Whetstone*, 47 O. S. 196.

No. 380. Change of grade—Retaining Wall—Whether necessary to protect buildings—Interest on cost of retaining wall.—"It is for the jury to say, taking into consideration all the testimony on the subject, whether under the circumstances a retaining wall was reasonably necessary to protect plaintiff's buildings and improvements, and if a wall was necessary, then whether the wall which was constructed was such a retaining wall as was reasonably necessary. And if you find that the wall was reasonably necessary, and the wall constructed was a reasonable one for the purpose, then the plaintiff should recover the fair and reasonable cost of such wall. And if on this question as to a retaining wall you find for the plaintiff, then he will be entitled to recover interest on the fair and reasonable cost of the retaining wall from the time of its completion up to the first day of the present term."

From *Cincinnati v. Whetstone*, 47 O. S. 196.

No. 381. Streets—Change of grade—Damages—A different form.—Example: Plaintiff owns a lot with a house thereon upon property, the ownership of which has continued for fifteen years. Claim is made that, before the erection of improvements upon the lot, which was vacant at the time of purchase, the city had established the grade for the street in front of the property; that the improvements were made upon the lot in conformity with the grade thus established, and that thereafter the city changed the grade of the street, thereby injuring the property. The following instructions may fit the case:

"There are several propositions which the plaintiff must prove by a preponderance of the evidence to entitle him to a verdict. You will bear in mind that the city owns all the streets therein, and has a right to exercise the same measure of control over the streets that an individual has over his own property.¹ The streets are for public use, the use of the citizens of the community. The city has the right to change the grade of the streets and to make such improvements as the public authorities in charge of the streets think in their judgment ought to be made. It is only under certain circumstances that a person who owns property abutting on a street can claim damages from the city for injury to that property. Before a recovery can be had you must be satisfied that the city, before these improvements were made upon the

¹ A city has a *proprietary* interest in the street. *Cincinnati v. Hamilton County*, 1 Disn. 4; *In re Hotel Alley*, 25 W. L. B. 89. It is not private property of the corporation. *State ex rel. v. Gas Co.*, 18 O. S. 262.

lot, established a grade upon the street in front of this property.² "

² Pugh, Judge, in *Braley v. City of Columbus*, Franklin County Common Pleas. City liable where it alters the level of a street after a proprietor has built with an express view to the grade established by the city. 4 O. 500; 4 O. 514; 15 O. 474; 18 O. 229. Lot-owners may rely on an established grade. 14 O. S. 523. Grading vacant lot to conform to a grade is an improvement. 5 O. C. C. 225. Improvements made in accordance with an established grade which is afterwards altered entitles owner to compensation. 7 O. S. 459. One who builds in anticipation of an established grade may recover for an unreasonable grade. 34 O. S. 328.

No. 382. Change of grade after improvement—How this shall be proved.—Whether or not the municipality has changed a grade after the improvements have been made upon the lot may be proved in several ways. It may be done by showing that the city council passed an ordinance by the terms of which the grade of the street was fixed or established. Where an ordinance is introduced in evidence to show that a grade has been made, it is necessary that the plaintiff show proof that the ordinance applies to that part of the street upon which the property of the plaintiff is located. It is also necessary that the plaintiff show proof that the authorities of the city having charge of the street at the time, pursuant to the ordinance, went upon the street and graded it as the ordinance requires, or that the public authorities advertised for contracts, and that contracts were awarded to persons who afterwards went upon the street and graded it in conformity with the ordinance.

But the plaintiff is not limited to prove an establishment of a grade by legislative action of the city council, or by the passage of an ordinance or resolution of the council. He may have the right to offer testimony to prove that the public authorities having charge of the streets used the street in such a way as to make it appear that a grade had been permanently established or a level had there been permanently adopted on the street, whether in accord with an ordained established line or not. To show that a grade has been fixed by the city in this manner it is incumbent upon the plaintiff to show that the improvement made upon the street by grading or working it was done under the direction and sanction of the proper public authorities of the city.

From *Braley v. City of Columbus*, Franklin County Common Pleas. D. F. Pugh, Judge.

No. 383. Whether improvement made in conformity to established grade.—Before recovery can be had by the plaintiff he must show by a preponderance of the evidence whether

or not the improvement was made upon the lot in conformity to the established grade. It must be shown in substance that the plaintiff was led by the action of the city authorities in thus fixing the grade of the street to take that surface or that level as existing and as established, and so, without expecting any change to be made thereafter, he erected his improvements accordingly.

From *Braley v. City of Columbus*, Common Pleas. D. F. Pugh, Judge.

No. 384. Change of grade—Damages recoverable—Injury to building—Shrubbery—Access to premises—Value before and after change.—There may be two classes of damages recovered in such a case, the first being a damage to the property caused by the change of the grade injuring some of the improvements on the lot.

(a) Injury to fences—Shrubbery—Building.

If the change of grade destroy the fences or injure the house in any manner, that would be an injury for which the city would be liable in damages, unless the city repaired the damages afterwards. The questions that you may consider are whether or not the change injured the fence, or property, or any shrubbery, or whether it became necessary to perform work upon the house to restore it to a condition as good as it was before the change of grade.

(b) Injury to access.

The other class of damages consists in the change of grade affecting the use of the property to the extent that the use of the property may have been affected by impairing the access between the street and the lot and the improvements thereon, either over or to the property, the plaintiff, if he has a right to recover, is entitled to damages which he may sustain by reason of such injury to the access to the property. If the street was filled up so that the improvements upon the property were left below the street, that would make it naturally less accessible from the street, and make the street less accessible from the improvements. If that has been proved, then that is the ground upon which you may assess damages.

(c) Value before and after change.

You may inquire also into the value of the property before and after the change of grade, and also as to the cost or expense in making a change in the property so that it may correspond with the change of grade. This is for the purpose of enabling you to ascertain what the depreciation in the value of the property was, which may be the measure of the damage. If there has been no depreciation in value there can not be any recovery of damages. If there was a depreciation,

then the plaintiff is entitled to whatever that depreciation amounts to as expressed in dollars and cents. If the injury that may have been caused to the access to the property has been repaired or remedied by the city, and the value of the property has not thereby been diminished, there can be no recovery at all.

If, after changes which a prudent man would make to restore the premises to as good condition with respect to the new grade as they were in with reference to the old, they are of the same value as before the change of grade, the reasonable cost of such restoration would be what the owner is entitled to recover. If, under like circumstances they are less valuable when restored than before the change of grade, the amount of this diminution in value should be added to the cost of restoration as the amount of the recovery. If, under like circumstances they are more valuable when restored than they were before the change of grade, there should be a recovery for the difference between the cost of restoration and this increase of value, if the increase of value is less than the cost of restoration; but if the increase in the value of the property is more than the cost of restoration, then the plaintiff would not be entitled to recover anything.

From *Braley v. City of Columbus*, Franklin County Common Pleas. Pugh, Judge. Damages can not exceed value of lot, 5 O. C. C. 225. Only injury to premises and not to particular use is recoverable, 12 W. L. B. 247; 130 U. S. 426. See full discussion of allowance of benefits in a note, ante, page 89.

No. 385. Damages—Consideration of market value — Opinion evidence. — Inasmuch as you may take into consideration the general value of the property in the market before and after the change of grade, and for the reason that it is the chief measurement of damages, the evidence of course may take a wide range. Witnesses may be put upon the stand by both sides, who will give their opinions as to the value of the property. You are instructed, however, that these opinions are not binding upon you. You are not bound to follow them slavishly. These opinions are competent testimony, and it is your duty to consider them in determining what damages there are, if you find there have been any damages to the plaintiff; but you are not bound to adopt the opinions of the witnesses merely because they have given them. You will take all the evidence into consideration and determine for yourselves, according to your own judgment, what depreciation in value, if any, there was.

From *Braley v. City of Columbus*, Franklin County Common Pleas. Pugh, Judge. The measure of damages is the difference in the market value before and after the change. 119 Mass. 372; 108 Mass. 372; 108 Mass. 60; 52 Ia. 303; 50 Wis. 78

No. 386. Damages—Enhancement of value—Consideration thereof.—In estimating the damages which the plaintiff may have sustained, you can not deduct from any injury which the property may have sustained the general benefit that the plaintiff received in common with the general public on account of the improvement in the street. If the improvement of the street, the passage to and from the city for the whole public, not only the plaintiff but of all the general public, was rendered more convenient than it was before, then you can not deduct that benefit from the damages that may have been sustained by the plaintiff. The reason of that is that it is a public benefit and the public must pay for it, and the plaintiff as one of the owners of property abutting on this street must assist in paying for it. The plaintiff pays for that kind of a benefit and, therefore, you have no right to deduct the value of that benefit from any injury which the property may have sustained by the raising of the grade in front thereof.

From *Brale v. City of Columbus*, Franklin County Common Pleas. Pugh, Judge. In a suit to fix damages to result from a street improvement, it is an error to admit evidence of enhancement of value on account of improvement, if no claim is made that such increase results from a *special* benefit, different from a *general* benefit. *Martin v. Bond Hill*, 7 C. C. 271. See extensive note upon the allowance of benefits, ante, page 89.

No. 387. Change of grade—Damages—Benefits.—Now when the city establishes a grade and abutting owners establish improvements on their property in accordance with such grade, and the city subsequently adopts a different grade, it does so under the responsibility of paying the abutting owners whatever damages accrue to the improvements by reason of such change of grade. Such damages may be either on account of the destruction of the improvements, or by destruction of part and injury to the remaining part. But such damages are allowable only with respect to improvements made in conformity to the established grade, and are limited to the injury to such improvements.

Hence, in considering damages which may have been made after the change in grade in 18— and 18—, if any, so you must exclude from your consideration any effect which the change of grade might have had on the value of the plaintiff's real estate or land. It is simply damages to the improvements to which your inquiry is limited in that regard. As to the amount of such damages, it is simply determined by your ascertaining the decrease in value, how much less valuable were these improvements by reason of raising the grade of the street. In other words, the damages are to be

measured by the difference between the value of the buildings and structures immediately before the change of grade in 18— and 18— and the value immediately after the change of grade, without deduction for general benefits that might accrue from change of grade in the vicinity, or from the fact that the property from the change of grade may be improved for public use or passage.¹

Benefits of that sort belong to the public and are not to be considered by you in estimating these damages. To the extent, therefore, that the use of these buildings and improvements are affected by impairing the access to the buildings from the street, to the extent they have been injured in any other manner by reason of the change of grade, whether by injuring the walls, impairing the usefulness of the buildings, or causing dampness, so far as the change of grade blocks, impairs, or interferes with the access to the property and the damage to the structures, it is for your consideration. So you have also the right to consider whether or not the buildings can be repaired, or whether they may be rebuilt or reconstructed or abandoned. These are all matters to be considered by you in considering how much less valuable the premises are by reason of the changes made. It is not necessary that you should know what the owners may do in regard to repairing, restoring, or abandoning the buildings, but for the purpose of determining the extent of the damages, whether that has been partial or entire. Whether a partial destruction or entire destruction, and for that purpose you may consider the probability of what a prudent man would do under such circumstances; whether to repair, restore, pull down and rebuild, or abandon.

Bearing in mind all the time that the thing you are to determine is, how much less valuable the improvements were after the change of grade than they were before. Testimony has been introduced as to the value of the structures and improvements before the change of grade and after the change of grade, also in regard to the cost of modifying or adapting the buildings to the new grade, according to the various plans, all of which has been admitted not as fixing the amount of damage, but to aid you in arriving at the amount of decrease in value. There is no certain rule that can be laid down as to the extent of which improvements are affected by such a change of grade. It is a question which must be left to your judgment. Taking into consideration the estimates and opinions of witnesses, but being in the end your own judgment. Opinions of witnesses, in the way of esti-

¹ Martin v. Bond Hill, 7 C. C. 271: ante, page 89.

mates of damages, are testimony, but only testimony. And it is your province to judge of the weight of the testimony.²

² From *Cincinnati v. Whetstone*, 49 O. S. 196. See generally as to damages where Ohio cases are collected. Kinkead's Code Pleading, Sec. 866.

No. 388. Damages to property-owner by construction of street.—As the case has been submitted to you, there is only one thing for you to do, and that is, the value of this property must be assessed at the time it was appropriated to street purposes, and the damage, if any there was, to the remainder by reason of the taking of the part which was taken. The question to be passed upon divides itself into two parts. First, the value of the property which was taken, and, second, the question as to whether the remainder of it was damaged, and, if it was, how much. As to the first question, the plaintiffs are entitled to receive the fair cash value of the property at the time it was taken. It is not what it may have sold for for any particular purpose, or in any particular manner, but what it would have sold for, taking it for all reasonable uses it might have been put to, what was its then fair selling value. And you will consider the nature of the property, its surroundings, and all the legitimate uses to which it could have been put, and all the testimony before you on the subject of its value, and of the value of the property in that vicinity, which has been submitted for the purpose of enabling you to arrive at what this piece of ground was worth. You are not to regard it as if you were buying it; nor are you to regard it as if you were selling it; but generally to look upon it, disinterestedly, and to endeavor to arrive at its fair cash market value at the time when it was taken, as it lay then.

Coming then to the other question as to the remainder of the property. The plaintiffs are entitled to something in addition, if the value of the remainder has been reduced by reason of the appropriation in some way other than the mere taking away; of course the value would be reduced by taking off a portion, but if that is all the damage done, when you have paid them for the portion that has been taken, that would be all they are entitled to. But it sometimes happens that in taking off a piece of property, the remainder is lying in such a situation as to be unavailable, or, at least, of very little use or value. So, while there may be a considerable piece of property left in some cases, yet it is lying in such shape and condition that it is of very little use, and that is what we mean when we say they are entitled to recover any damage of that sort which may have occurred to this piece of property which is left. You will consider its situation

immediately after the appropriation was made by the city. To determine whether or not it was damaged by the appropriation of the piece that was taken for some purpose you may take into consideration the fact that the piece that was taken was taken for street purposes; and in determining this question of the damage to the remainder, you may take into consideration whether there were any incidental benefits to the remainder which would offset any damage that there might be in some aspects; for instance, it might be damaged in one aspect of it, and it might be benefited in another, and in considering the question of damage to the remainder, you may take that matter of benefit into consideration, so as to determine whether upon the whole the piece that remains in possession of the L. estate was or was not damaged. If it was not, upon the whole, then they are not entitled to anything. If it was, then they are entitled to the amount of that damage, whatever you may find it to be; but in no event can you set off any benefits that may have accrued to the property, or any of it, by reason of the construction of a new street there, as against the compensation that the plaintiffs are entitled to for the amount actually taken; that they are to have compensation for under the constitution and laws of this state, without any deduction for any benefit that the street may have been to the remainder.

From Joseph Longworth et al. v. City of Cincinnati, Supreme Court, No. 1453. H. D. Peck, Judge.

NEGLIGENCE.

(1) Opening Statements.

No. 389. General form of opening statement in negligence cases.—*After statement of pleadings and facts proceed:*

By this statement of the claims of the parties you have been given in substance the matters on which the parties are at issue by their pleadings. These pleadings will be before you and can be examined by you; but, aside from the admissions therein, they are not evidence in the case, and must not be considered or regarded by you. These issues present for your consideration and determination three principal propositions which are as follows: 1. Was the defendant negligent in one or all of the particulars complained of? 2. If so negligent, was this negligence the proximate cause of the

injury to plaintiff of which he complains? 3. Did the negligence or want of care on the part of the plaintiff contribute to cause or produce the injury which he sustained?

Taking up these questions in the order suggested, you will proceed to inquire and determine whether or not the defendant was negligent in any or all of the particulars complained of, and if you find that it was not so negligent, then you need not inquire further, but should return your verdict for the defendant; but if you find it was so negligent, then you will proceed further and inquire and determine whether or not this negligence so found by you was the proximate cause of the injury to the plaintiff of which he complains, and if you find it was not such cause, you need not inquire further, but return your verdict for the defendant; but if you find it was such cause, then you will proceed to inquire and determine whether or not the plaintiff himself was negligent, and if you find he was negligent and that his negligence contributed to the cause or produced his injuries, the defendant would be entitled to your verdict; but if you find there was no contributory negligence on the part of the plaintiff, and have also found the other matters to which your attention has just been called in his favor, then the plaintiff would be entitled to your verdict. (See No. 391 for definition of negligence, etc.)

In determining these questions as well as any others submitted, you should carefully consider all the testimony before you, giving to it all such weight, and such only, as in your best judgment it should be entitled to, and in weighing this testimony, you should consider the interest the parties testifying may have in the result of this suit; their employment, their intelligence, and means of knowledge; how far the same is contradicted or corroborated by either testimony or any other matter that would influence them in giving their testimony; upon the question of negligence on the part of the defendant, or as to such negligence being the proximate cause of injury to the plaintiff, the burden of proof is upon the plaintiff, and he must produce a preponderance of the testimony upon each of these propositions before you can find in his favor upon them; but if he has produced such preponderance of the testimony, then upon such propositions he would, as to that proposition, be entitled to a finding in his favor; but unless such preponderance is produced by the plaintiff, it will be your duty to find against the plaintiff.

Upon the question of contributory negligence upon the part of the plaintiff, the burden of proof is upon the defendant, unless the testimony upon the part of the plaintiff raises a presumption of contributory negligence upon his part, in

which event the burden of proof devolves upon the plaintiff, not only to remove and rebut this presumption, but to establish the fact that such contributory negligence did not exist.

Johnston, Judge, in *Whittaker v. Penn. Co.*

No. 390. A proper introductory for any case of negligence—After statement of case.—The plaintiff holds the affirmative, upon him rests the burden of establishing the right to recover.¹

There is no presumption that the railroad company was negligent, or that the negligence of the railroad company occasioned the injury complained of, from the mere fact that the plaintiff received his injury while he was in the service of the company.² To entitle the plaintiff to recover it is incumbent upon him to show by a preponderance of evidence that the company was negligent in the respects complained of in the petition—or some of them—and that the injury which the plaintiff received resulted directly from such negligence. And there is this further general rule: Notwithstanding any negligence of the defendant, the plaintiff can not recover if he was himself guilty of contributory negligence, as it is called, that is, if, by his own failure or omission to exercise ordinary and reasonable care, he contributed to his own injury.

The burden of proving contributory negligence on the part of the plaintiff is upon the defendant,³ with this qualification: that if the testimony introduced by the plaintiff as to the circumstances under which this injury was received fairly raises a presumption in your minds that he was guilty of contributory negligence, then the burden is upon him to remove that presumption.⁴

The general questions, then, which are involved in this case are: whether there was negligence on the part of the defendant, and whether there was contributory negligence on the part of the plaintiff. The burden of proving contributory negligence on the part of the plaintiff is upon the defendant, with the qualification already stated.

I will now call your attention to the specific rules of law which are involved in the allegations of the parties and the evidence in the case.

¹ *Cooley, Sup.*

² Cf. *Cooley on Torts*, 794. Presumptions under certain circumstances. *Id.* 796. There is a presumption of negligence from a collision. *R. R. Co. v. Mowery*, 36 O. S. 418.

³ There is a presumption that plaintiff is free from negligence which casts burden of proof on defendant. 15 Wall., 401; 50 Cal. 7; 30 Wis. 892; 51 Mo. 190; 66 Pa. St. 393.

⁴ *Railroad Co. v. Whitacre*, 35 O. S. 627. But see *Cooley on Torts*, 809-10, cases in note 1, p. 110.

(2) General Principles Applicable to All Cases.

No. 391. Negligence—Ordinary care—Defined.—Negligence in a legal sense consists of some act or omission of duty that, in the natural and ordinary course of events, might cause all the injury complained of. It is defined as being ordinary want of care, and may consist in doing something that ought not to be done, or in not doing something which ought to be done. By ordinary care we mean that degree of care which persons of ordinary care and prudence are accustomed to use and employ under the same or similar circumstances, in order to conduct the enterprise in which they are engaged to a safe and successful termination, having due regard for the rights of others, and the objects to be accomplished. It is such care as prudent persons are accustomed to exercise under the peculiar circumstances of each case. If called into exercise under circumstances of peculiar peril, a greater amount of care is required than where the circumstances are less perilous, because prudent and careful persons in such cases are accustomed to exercise more care than in cases less perilous. It is still nothing more than ordinary care under the circumstances of the particular case. But it should be that degree of care and prudence that the circumstances reasonably require; that is, it should be commensurate with the hazards ordinarily encountered.

The circumstances determine whether the proper amount of care has been exercised or not. The want of proper care is the want of that care which a reasonable man, guided by these considerations which regulate the conduct of human affairs, would have exercised under the circumstances of the particular case, the failure to observe the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand.

Voris, Judge, in *Quinn v. Ewart*, Summit County Common Pleas.

Negligence defined. *Kinkead's Code Plg.*, Sec. 914; *Harriman v. Railway Co.*, 45 O. S. 20; *Cooley on Torts*, 791 (659); *Moulder v. R. R. Co.*, 1 O. N. P. 361.

Distinction between gross and ordinary negligence. 37 O. S. 301, 313; 12 O. S. 475, 496; 28 O. S. 388, 402; *Cooley on Torts*, 753 (631); *Jones on Bailments*, 4-10.

Ordinary care is usually defined in instructions according to definition in *Terry case*. 8 O. S. 582.

Negligence is the absence of care according to the facts and circumstances of each case. 29 Md. 420; 78 Pa. St. 219; 54 Pa. St. 345. *Cooley's* definition: "Negligence is the failure to observe, for the protection of the interest of another, that degree of care, precaution and vigilance which the circumstances justly demand" (*Cooley*, 630), is generally accepted. *Jaggard on Torts*, 810, where various definitions are collected.

Negligence should be measured by the character and the risk of the business. *Railway Co. v. Gormly*, 27 S. W. 1051.

No. 392. Negligence defined—Another form—Ordinary care under circumstances of peculiar peril—Intent not an element of negligence.—It is defined as being the want of ordinary care, and may consist in doing something which ought not to be done, or in not doing something which ought to be done. Ordinary care is that degree of care which persons of ordinary care and prudence are accustomed to use, and employ under the same or similar circumstances, in order to conduct the enterprise in which they are engaged to a safe and successful termination, having due regard for the rights of others and the objects to be accomplished. The ordinary care required by the rule has not only an absolute but also a relative signification. It is such care as prudent persons are accustomed to exercise under the peculiar circumstances of each case. If called into exercise under circumstances of peculiar peril, a greater amount of care is required than where the circumstances are less perilous, because prudent and careful persons, having in view the objects to be attained, and the just rights of others in such cases, are accustomed to exercise more care than in cases less perilous. The amount of care is, indeed, increased, but the standard is the same; it is still nothing more than ordinary care under the circumstances of the particular case.

The circumstances, then, are to be regarded in determining whether ordinary care was exercised. The want of proper care is the want of that care which a reasonable man, guided by those considerations which should regulate the conduct of human affairs, would have exercised under the circumstances of the particular case.

Intent is not an element of legal negligence. Therefore, the plaintiff need not show that the injury was intentional; but the negligence complained of, to enable the plaintiff to recover, must be the proximate cause of the injury.

By A. C. Voris, Judge.

No. 393. Ordinary care.—Ordinary care means that degree of care which persons of ordinary care and prudence are accustomed to use and employ, under the same or similar circumstances, in order to conduct the enterprise engaged in to a safe and successful termination, having due regard to the rights of others and the object to be accomplished. *Ordinary care*, therefore, requires in different circumstances different degrees of watchfulness, so that what would be reasonable or ordinary care under one state of circumstances would not be such under another.

By the term "ordinary care," as here used, is meant such

care as ordinarily prudent persons ordinarily exercise, or are accustomed to exercise, under the same or similar circumstances, in conducting and carrying on the same or similar business, and this applies to the defendant so far as the negligence complained of is concerned, as well as to the plaintiff in regard to contributory negligence on his part.

Terry case, 8 O. S. 582. The obligation to exercise care "must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge and one state of circumstances would be gross negligence with different knowledge and in changed circumstances." 15 Wall. 524.

No. 394. Ordinary care under circumstances of peculiar peril.—By ordinary care is meant that degree of care which a person of ordinary care and prudence is accustomed to use and employ under the same or similar circumstances. If called into exercise under circumstances of peculiar peril, a greater amount of care is required than when the circumstances are less perilous, because prudent and careful persons, having in view the object to be attained and a just regard for the rights of others, are, in such cases, accustomed to exercise more care than cases less perilous. The amount of care is indeed increased, but the standard is still the same. It is still nothing more than ordinary care under the circumstances of the particular case. The jury ought, therefore, to take into consideration the circumstances in determining whether or not ordinary care was used.

Ordinary care varies with the danger and circumstances. 24 O. S. 631, 639; 24 O. S. 670, 676; 50 O. S. 135, 144. It varies in proportion to the peril. 8 O. S. 570, 581. Even in dangerous business ordinary care only is to be used; the degree of care is always ordinary under the circumstances of each particular case. The degree of care may be increased in different cases, owing to the character of surrounding circumstances. Weiser v. St. R. Co. 10 O. C. C. 14.

It is denominated "ordinary," in the sense that it is such as persons of ordinary care and caution usually observe under like circumstances; and it is sometimes denominated the "highest" degree of care and caution, in the sense that persons of ordinary care and caution usually observe their highest degree of care and caution under such circumstances; that is, where human life is in peril. It is "ordinary" care and caution, with reference to the *class of persons* who exercise it, but it is the "highest" degree of care and caution with reference to the *circumstances* under which it is exercised. Railway Co. v. Snyder, 24 O. S. 676.

No. 395. No presumption of negligence against either party.—There is no presumption against either party in this suit, excepting such as arises from the facts proved. The presumption of law is that neither party was guilty of the negligence or wrongful conduct alleged, and such presumption must prevail until overcome by the evidence submitted to

you. The wrongful acts complained of in order to enable the plaintiff to recover must be the proximate cause of the injury.

Voris, Judge, in *Quinn v. Ewart*, Summit County Common Pleas.

See ante, p. 289, note. This is applicable of course to cases where there is no such presumption.

No. 396. Proximate cause defined and explained.—By proximate cause is meant a cause from which a man of ordinary experience and sagacity could foresee what result would likely follow; that the injury was of such a character as might reasonably have been foreseen or expected as a natural and ordinary result of the acts or omission complained of. The injury must have been the direct and not the remote result thereof. In this sense you will inquire into the evidence to determine whether the defendants were guilty as charged; whether the decedent was guilty of contributory negligence as charged. In the light of the evidence, how do you find the facts alleged in the plaintiff's petition to be? How do you find the facts charged in the answer to be? The evidence and our instruction to you should be your sole guide in determining the true answers to these questions. You have no right to indulge in speculation or conjectures not supported by the evidence. The plaintiff can only recover upon the particular acts complained of in the petition, but it is sufficient if you find any such acts or omissions on the part of the defendants that proximately caused the injury complained of, if in other respects your finding answers the conditions of our instructions to you. Injury alone will not support an action, there must be a concurrence of injury and wrong.

Voris, Judge, in *Quinn v. Ewart*, Summit County Common Pleas. *Sherman and Red. on Neg.*, Sec. 26.

No. 397. Proximate cause—Another definition.—By this term "proximate cause" is meant the cause which directly produced the injury. This term is used in contradistinction to the term "remote cause." A proximate cause does not necessarily mean the cause nearest in point of time or in point of distance, but it does mean that cause without the existence of which the injury would not have been sustained. Sometimes an intervening cause may occur between a proximate cause and the result which follows from this proximate cause. If such intervening cause is an independent one, and one which would not necessarily follow or result from the proximate cause itself, then this independent, intervening cause would be and constitute a proximate cause in a series of causes which combine to produce the injury, and if this intervening

cause was the necessary or natural result of the original cause, even though it may have been nearer the result in point of time than the original cause, it would not constitute the proximate cause, but would be regarded in law as the remote cause of the injury.

Definitions.—"The proximate cause of an injury is that which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. . . . The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof." *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400; 11 C. C. A. 253. See, for full treatment and copious notes, *Cooley on Torts*, 73-86.

Where the carelessness of plaintiff as well as that of defendant contributed to the injury, the jury should be instructed unambiguously that the plaintiff can not recover if the jury so find the facts. *Railway Co. v. Krichbaum*, 24 O. S. 119. See *Cooley on Torts*, 816 (679).

In cases of mutual negligence, the negligence of each is the proximate cause, and neither can recover. 6 O. S. 105, 109; 3 O. S. 172, 188; 24 O. S. 119. Plaintiff's negligence to bar recovery must be a proximate cause. 4 O. S. 474; 3 O. S. 172.

No. 398. No recovery for action without fault of defendant.—If, guided by these instructions, you should find that the plaintiff's charge of negligence, or other wrongful conduct alleged, is not supported by a preponderance of the evidence, or if you find from the evidence that the injuries complained of happened by mere accident, without fault on the part of defendants, or though you should find from a preponderance of the evidence that the defendants were so guilty, yet if you so find from the evidence that the injury complained of would not have occurred but for the concurrent negligence of the decedent (or plaintiff) directly contributing thereto, as hereinafter explained and qualified, the plaintiff can not recover and your verdict should be for the defendant.

Voris, Judge, in Quinn v. Ewart, Summit County Common Pleas.

No. 399. No recovery when there is contributory negligence.—Nor can the plaintiff recover compensation for any damages which he might have avoided by the use of ordinary care and prudence under the circumstances; so, if the plaintiff (or decedent) did not take reasonable care under the circumstances, or if he voluntarily exposed himself to hazards he ought not to have encountered under the circumstances known to him, or that reasonably ought to have been known to him, and he thereby proximately caused the said injuries, the plaintiff can not recover. All that the law requires of the injured party in this respect is that he should act with reasonable care and prudence under the circumstances known to him, or that reasonably ought to have been known to him.

That is, he should act reasonably, considering the means of knowledge he had and the circumstances surrounding him, taking him just as you find him to have been, considering his age, inexperience, intelligence, and judgment as you find them to be from the evidence.

Voris, Judge, in *Quinn v. Ewart*, Summit County Common Pleas.

Contributory negligence only ceases to be a defense if defendant could have avoided the injury *by ordinary care*. 8 W. L. B. 257. The plaintiff's right of recovery is not precluded in all cases where he omits to employ his senses to discover and avoid injury, even though the omission be regarded as negligence. It does so only when the omission *contributes* to the injury. *R. R. Co. v. Whitacre*, 35 O. S. 631; *R. R. Co. v. Crawford*, 24 O. S. 628.

No. 400. Contributory negligence—The negligence must be proximate cause of injury—Explained—(A concise charge).—If you should find from all the evidence in the case, in accordance with the rules of the burden of proof as I shall hereafter state them, that M. B. was not in the exercise of due care, as I have before defined it, at the time of the injury, and that this absence of due care, together with the negligence of the company, combined to cause the injury and death to him, then he would be guilty of contributory negligence within the meaning of the law, and his administrator could not recover.

The negligence of which I have spoken, whether on the part of B. or the defendant, must, in the language of the law, be a proximate cause of the injury. An act or omission is the proximate cause of an event when, in the natural order of things and under the circumstances, it would necessarily produce that event; that is to say, when it is the first and direct power producing the result. If the negligence and resulting damages are not known by common experience, or are not found by you to be usually and naturally in sequence, and the damage does not, according to the ordinary course of events, follow from the negligence, then the negligence and the damage are not sufficiently conjoined—not sufficiently linked together—as cause and effect to sustain an action if the negligence be that of the defendant, or to bar an action as contributory negligence if the negligence in such case be that of plaintiff.

Hence, if you find from the evidence that the defendant company was negligent, but that said negligence was not linked to said injury as cause to effect, then such negligence was not a proximate cause as before defined, and will not sustain this action. If, on the other hand, you find that the plaintiff was guilty of negligence, and you further find that such negligence did not contribute as a proximate cause to

the injury, then the plaintiff will not, for that reason, be barred of a recovery in this action.

W. T. Mooney, Judge, in *Chicago & E. R. R. Co. v. Purviance*.

No. 401. When plaintiff must show himself without fault—Burden.—It is not necessary in the first instance that plaintiff should show he was free from blame and not in fault, unless his own evidence suggests that he was negligent and to blame for the injury. If contributory negligence is suggested by plaintiff's own evidence, then the burden is on him to remove and dispel the suggestion, and show himself blameless to the jury. If not so suggested by plaintiff's evidence, then such contributory negligence as will defeat a recovery, to be available, must be shown by defendant. In such case, the burden is on the defendant, and it must make it appear to the satisfaction of the jury by a preponderance of evidence.

When the case is such as necessarily devolves carefulness on the part of plaintiff, and the testimony to support it fairly puts in question the due exercise of care on his part, the jury, in determining the question of contributory negligence, should consider all the evidence. *Robinson v. Gary*, 28 O. S. 241. If plaintiff's testimony raises a presumption of contributory negligence, the burden is upon him to remove that presumption. *R. R. Co. v. Whitacre*, 35 O. S. 627, 630; *Hays v. Gallagher*, 72 Pa. St., 140; *Wharton on Neg.*, Secs. 425, 428; 28 O. S. 241.

No. 402. Burden of proving contributory negligence.—The burden of proof as to contributory negligence is upon the defendant, unless the evidence introduced on the part of the plaintiff tends to show that the plaintiff was guilty of negligence, in which case it would be your duty to find from a preponderance of the evidence of the whole truth that he was not guilty of negligence that contributed to his injury before he would be entitled to recover.

Gillmer, Judge, in *Trowbridge v. R. R. Co.*

The authorities upon the burden of proof vary in different states. *Sherm. & Red.*, Secs. 106-7. See ante, No. 401, note. See full discussion also in *Booth's Street Railways*, Sec. 381; *Balto. & Ohio R. R. Co. v. Whitacre*, 35 O. S. 627.

No. 403. Contributory negligence — Burden of proof shifts when.—Upon the question of contributory negligence, the burden of proof is upon the defendant, unless the testimony on the part of the plaintiff discloses such conduct on his part as to raise a presumption of contributory negligence against him, in which event the burden of proof would shift to plaintiff, and he would then be required to produce a preponderance of the evidence to rebut and remove this presumption, and in support of the fact that contributory negligence did not exist.

See ante, Nos. 401, 402, note.

No. 404. Contributory negligence as applicable to children.—"In the application of the doctrine of contributory negligence to children for injuries occasioned by the wrongful conduct or negligence of others, their conduct should not be judged by the same rule which governs that of adults; and, while it is their duty to exercise ordinary care to avoid the injuries complained of, ordinary care for them is that degree of care which children of the same age of ordinary care and prudence are accustomed to exercise under similar circumstances.

"Persons who employ children to work with or about dangerous machinery, or in dangerous places, should anticipate that they will exercise only such judgment, discretion, and care as is usual among children of the same age under similar circumstances, and are bound to use due care, having regard to their age and inexperience, to protect them from the dangers incident to the circumstances in which they are placed, and as a reasonable precaution in the exercise of such care as ought reasonably to be expected of them, guarding against and avoiding injuries arising therefrom. But since the enactment of April 18, 1890,¹ they may not willfully employ or permit children under the age of 16 years to be placed in a position, or to be engaged in such employment, that their life or limb is in danger.

"Such employee who has not been so instructed, and who, while in the discharge of his duty as he understands it, suffers an injury in consequence of the employer's negligence, may maintain an action against the employer therefor, notwithstanding that, by reason of his youth and inexperience and the failure of the employer to properly instruct him, he did some act, in the performance of his duty according to the judgment and knowledge he possessed, which contributed to the injury, but which he did not know and was not advised would be likely to injure him."²

But it is for you to determine from a preponderance of the evidence whether the decedent was or was not a child under the age of 16 years; and if you find him to have been under that age, whether or not the defendants willfully permitted his life and limb to be endangered while so employed by them, or willfully permitted him to be placed in such position, or to engage in such employment at the time of the injury, that his life or limb was endangered; whether he was properly instructed; and whether or not such willful and negligent conduct, if any such existed, caused the injury complained

¹ 87 O. L. 161.

² *Rolling Mill v. Corrigan*, 46 O. S. 283; *Beach Contrib. Neg.*, Sec. 136.

of. These delinquencies must have existed at the time of the injury and be the cause thereof to enable the plaintiff to recover, if they existed.³

³ Voris, Judge, in *Quinn v. Ewart*, Summit County Common Pleas. See *Sherman & Redf. on Neg.*, Secs. 70, 73.

No. 405. Contributory negligence of children continued—Consent of children—Effect.—While, in a general way, it may be said that to the consenting there can be no damage, yet the consent, to avail as a defense, must be the consent of a person capable of giving consent. They must have intelligence, judgment and free will; not idiots, imbeciles, insane or mere children. The law holds that infants in general can not give consent, but this holding can not apply to all infants. It is, after all, in actions like this, a question of capacity to be determined by the jury under the circumstances of the case, considering them as children. In any event the consent must be founded in an intelligent judgment to be available. This legal disability arises out of the tender regard of the law to the want of understanding and inexperience of children, and as a shield to protect them against those who would take advantage of their condition.

Voris, Judge, in *Quinn v. Ewart*, Summit County Common Pleas.

No. 406. Contributory negligence — Intoxication as affecting.—The plaintiff can not recover if he was himself in fault at the time, which contributed to his injury, and if you find that he was incapable of taking care of himself, by reason of drink or any other cause, then he will not be entitled to recover. The plaintiffs claimed that intoxication, however, if proven, would not necessarily prevent recovery; but it bears upon the question whether or not he exercised reasonable and ordinary care, and if you find that he was intoxicated, and still find that he exercised reasonable and ordinary care to avoid the injury, but further find that, while he was negligent, such negligence did not contribute to the injury, that if the defendant was guilty of negligence, such negligence was not the proximate cause of his injury, the plaintiff would be entitled to your verdict.

If you find that the plaintiff was so intoxicated at the time of the accident as to disable him from exercising ordinary care, but find that at the time of the accident he was in charge and under the care of his son, who was at the time capable of exercising the ordinary care of an adult, and that he did exercise ordinary care under the circumstances, and if you find that the son was driving the vehicle, and that when

approaching the crossing exercised ordinary care, and you further find that defendant's agents in charge of the train were guilty of negligence which produced the injury, then your finding should be for the plaintiff. On the other hand, if the plaintiff by reason of intoxication contributed to the injury complained of, that would prevent a recovery. This is a question of fact for you to determine.

Gillmer, J., in *Flemming v. Penn. R. R. Co.*, Trumbull County Common Pleas

Intoxication tends to show contributory negligence, and is matter for the jury. Beach's *Contr. Neg.*, Sec. 197, citing *Seymour v. Lake*, 66 Wis. 651; *Ford v. Umatilla Co.*, 15 Ore. 313, etc; *Sherman & Redf. on Neg.* (4th ed.), Sec. 93.

Intoxication will not excuse one crossing a railroad track from the exercise of such care as is due care from a sober man. Beach's *Contrib. Neg.*, Sec. 197; *Yarnall v. St. L.*, etc., R. R. Co., 75 Mo. 575; *Kean v. B. & O. R. R. Co.*, 61 Md. 154.

No. 407. Imputed negligence—Doctrine of, does not prevail in Ohio.—"The doctrine of imputed negligence does not prevail in Ohio; and if you find that the deceased died through the wrongful act, neglect, or default of the defendant, by himself or his agent, then the plaintiff is not deprived of the right of action in this case by reason of contributory negligence on the part of the husband or anyone else, unless such person was acting as agent of the deceased at the time."

From *Davis v. Guarnieri*, 45 O. S. 470.

No. 408. Negligence—Of parent not imputed to child.—"If it be found that the plaintiff was fully capable of taking reasonable care of herself, and was injured while lawfully riding with her father in his own wagon, then the conduct of the father in driving the wagon, any negligence on his part, with which the plaintiff had nothing to do, can not be attributed to her in that respect, even though the father by his negligence may have so contributed to the accident that he would be barred from recovery by his contributory negligence, it still will not prevent the plaintiff from recovering, unless she herself contributed to the negligence which caused the injury."

From *Street Railway Co. v. Eadie*, 43 O. S. 91. See 28 O. S. 399; 24 O. S. 670; 30 O. S. 451; *Booth on Street Railways*, Secs. 389, 390.

No. 409. Contributory negligence—Husband performing duties as such not agent of wife.—If the deceased by his own negligence, or that of her agent, contributed to bring about her death, the defendant is not liable. If her husband

acted as her agent in the purchase of the drug, then she is bound, and such an act would be an act to prevent a recovery in this case. But a purchase made by a husband for his wife in the discharge of his duty as a husband does not constitute him the agent of his wife. But in order to make the husband the agent of his wife, he must by her procurement and direction, and under her authority and control, have gone and made the purchase, and if he simply went in the discharge of his duty as a husband, he was not her agent in such a way that any carelessness of his could be attributed to her. If he was under her direction and control in such a way as to make him her agent, then his carelessness is her carelessness, and if he contributed by his negligence, the plaintiff can not recover here, for the plaintiff can only recover because the woman, had she lived, could recover."

From *Davis v. Guarnieri*, 45 O. S. 470. "The obtaining by the husband of food or medicine for his wife, with her knowledge and approval, does not of itself constitute such husband the agent of the wife in such sense as to charge her with his negligence. In order to make him the agent of the wife in such transaction, she must have selected the medicine, directed that he should purchase it, and he must have had nothing to do in the matter except by her procurement and direction. What he did in this matter simply in the discharge of his duty as a husband was not done as the agent of his wife, and his negligence in his duties as a husband are not chargeable to his wife." *Davis v. Guarnieri*, 45 O. S. 470. See *Booth on Street Railways*, Sec. 392.

No. 410. Injured must be free from negligence—Comparative negligence.—But the theory upon which the law proceeds in actions of negligence is that, although one is injured by the negligence of another, yet such injured person, or, as in this case, his administrator is not entitled to recover from that fact alone, unless the decedent was free from such negligence as a man of ordinary prudence, under all the circumstances, would be free from, or, to state the rule in different words, if a person is injured as the result of the combined negligence of himself and another person, the law of this state will not undertake to determine which of the two persons was the more negligent, but will simply refuse to permit the injured person, or his administrator under such a state of facts, to recover in damages from the other party.

W. T. Mooney, Judge, in *Chicago & E. R. R. Co. v. Purviance*, S. C., No. 3955. See fully *Beach's Contrib. Neg.*, Sec. 72 et seq.; *Booth on Street Railways*, Sec. 379.

No. 411. Hazardous employments—Employment of children in.—Many legitimate employments or occupations are essentially dangerous, in which an employee may be engaged without being held in law as negligent, if he exercises reason-

able care and prudence under the circumstances, while so employed, to save himself from ordinary hazards attending the employment; and if he so conducts himself in good faith, it can not be imputed to him that he is guilty of contributory negligence, if the master by his negligence in the prosecution of his hazardous occupation caused him wrongful injury. That is, he takes upon himself the hazards usually incident to the employment, but not that of the negligence of his employer, unless such negligence would be unknown to the servant had he exercised reasonable care. But you are instructed that children under the age of 16 years may not be employed in such occupations where life and limb are endangered, or health injured. The mere fact that a child under sixteen years of age consents to be employed in such occupation does not as a matter of law deprive him of the right of action for injuries so caused. That children under sixteen years of age shall not be so employed is the settled policy of the state, and whoever employs such children in such prohibited employment does so at his peril. The law does not stop here, but makes it the duty of employers who use in their business instrumentalities or agencies dangerous to life, limb, or health to so manage their business that such children shall not willfully or negligently be endangered thereby while actually in their employment.

The law imposes upon defendants the duty of exercising due care and caution to ascertain whether they employ persons under sixteen years of age in any such employment. It is their duty to see to it that their employees in such dangerous positions are not within the prohibited age. It is a just rule that holds them to the exercise of caution and good faith in this behalf, the requirements of which can not be thrown off by the mere ignorance of the employers as to the age of the servant. If the defendants were actually deceived, and in good faith believed from the statements made to them by the decedent as to his age and health, had good reason to believe that he was sixteen years of age at the time of his injuries, you may look to the testimony bearing upon this branch of the case in determining whether the defendants willfully exposed or permitted the decedent to be exposed to the hazards prohibited by the statute, giving this evidence just such weight as in your judgment it is entitled to. . . .

Irrespective of the age of the decedent and the fact that the employers set him to work with machinery dangerous to life and limb, it is their duty to see to it that the employee should not be exposed to other hazards than those fairly incident to the employment, and not to expose him to any

risks arising from want of reasonable care and prudence on the part of the employers in the selection, maintenance and operation of the same. It was the duty of the defendants not to expose the decedent to any hazards that reasonable care and prudence could guard against, and that care and prudence should be commensurate to the hazards ordinarily attending the business to which he was set to work. While the statute makes it unlawful to so employ children under the age of sixteen years, the fact of the age of the employee, the hazards of the employment, the actual existence of the alleged negligence must nevertheless be found from the evidence submitted to you, if found at all. The fact that the statute prohibits such employment may be considered by you with the other evidence in the case, as bearing upon the alleged negligence and other wrongful conduct of the defendant; but the mere fact that this statute was violated by the defendant in employing a person under the age of sixteen years, if you find that to be the fact from the evidence, does not of itself warrant a recovery against the defendant. The wrongful acts set out in the petition must be still established by other evidence.

Voris, Judge, in *Quinn v. Ewart*, Summit County Common Pleas. See *Meek v. Pa. Co.*, 38 O. S. 632, 637, 638. As to duty of employer to furnish suitable instrumentalities, etc., see *Davis v. R. R. Co.* 98 Cal. 19; 35 Am. St. and Rep. 133.

No. 412. Employment of children in hazardous places—Effect of statute requiring parents to send children to school.—You are instructed that the provisions of the statute which requires the parent to send his children under a certain age to school a given number of weeks each year can not be used as a shield to relieve the defendants from the responsibility, if you find them to be liable under the instructions and guided by them.

Voris, Judge, in *Quinn v. Ewart*, Summit County Common Pleas.

No. 413. Negligence—Duty of employer to infant employee.—"It is the duty of an infant employee to use ordinary care and prudence; just such care and prudence as a boy of his age of ordinary care and prudence would use under like or similar circumstances. The jury should take into consideration his age, the judgment and knowledge he possessed. If not understanding all the dangers and hazards of the situation in which he was placed by the foreman, and you find it was a dangerous and hazardous situation in which to place a boy of his age, judgment and experience, it was the duty of the foreman to instruct him in respect thereto, that he might

conduct himself so as to guard against such peril; and if he was injured by reason of the neglect or carelessness of the defendant, and by reason of his youth and want of judgment as to the perils of his position, did some act in the discharge of his duty as he understood it, which also contributed to the injury, and which he did not know to be likely to injure him, and had not been properly advised and instructed therein by the foreman, he is entitled to recover."

From *Rolling Mill v. Corrigan*, 46 O. S. 283.

No. 414. Hazardous employment—Duty of master—Operation of railroad is.—The determination of this case upon the issues thus made involves the application by you to the facts as you shall find them to be of the law governing the relation between employer and employee, or in the language of the law, between master and servant. Where a servant is employed to operate a machine, the operation of which, under ordinarily favorable conditions, is attended with danger to the person operating the same, or about a business, the conduct of which under ordinarily favorable circumstances is hazardous, a master is bound to use due care to furnish said machine properly constructed and reasonably well-adapted to perform the work required, and having so furnished said machine, to use due care to keep the same in a reasonably safe order and condition.

I am authorized to say to you, gentlemen, as a matter of law, that the operation of a freight train upon a railroad, and the performance of the duties of a brakeman thereon, is a hazardous business, and the rule which I have just given you applies to a railroad company in providing tracks, cars, etc., in a reasonably safe condition.

This rule does not make the master an insurer of the safety of the business about which the servant is employed, nor does it require the master, at all events, to provide tracks, cars, etc., which will not and do not injure. The rule requires only that the master use due care to guard against defects and to prevent injury.

This due care which the law exacts from the master is not necessarily satisfied by the exercise on the part of the master of that degree of care for the safety of the servant which might ordinarily be exercised. Due care is defined by the law to be such watchfulness, caution, and foresight as under all circumstances a man of ordinary prudence would exercise in view of the consequences that might result from the furnishing of defective or imperfect tracks or cars to a person engaged in the business of brakeman, and when I shall

hereafter speak to you of negligence I mean simply the absence of due care as just defined. And in this connection it is important to bear in mind another rule of law: "That a servant who undertakes any employment thereby assumes all the necessary, ordinary, inseparable, and inherent risks incident to such employment; that is to say, where the employment is accompanied with risks and dangers, of which the servant who enters it has notice, he can not, if he is injured by exposure to such risks and dangers, recover in damages from his master." This rule, however, presupposes that the master has exercised due care, as above defined, in providing proper appliances, tracks, etc., for the performance of the required service.

In accordance with these rules of law, and from the evidence in this case, the questions you will be called upon to determine are two in number.

First: Was the defendant guilty of negligence, and did such negligence occasion the injury to plaintiff, and

Second: Was the decedent, B., guilty of negligence, and did his negligence contribute to this injury and death?

W. T. Mooney, Judge, in *The Chicago & Erie R. R. v. Purviance*, Supreme Court, No. 3955. Judgments affirmed February 25, 1895. Van Wert County.

No. 415. Willfully permitting a child to be endangered while in employment.—You are instructed that it is wrongful for any person, firm, or corporation, to "willfully permit the life or limb of any child under the age of 16 years to be endangered while actually in their employment, or to willfully permit such child to be placed in such position, or to engage in such employment that its life or limb is in danger." It is so made wrongful by express provision of the statute.

Voris, Judge, Summit County. *Quinn v. Ewart*.

(3) Railroads—Duties to Passengers.

No. 416. Degree of care due from carrier to passenger.—The jury are instructed that railroads are public carriers, and that it is their duty as common carriers of passengers to use the highest degree of care towards their passengers; they must do all that human care, vigilance, and foresight can do under the circumstances, and in view of the character of the mode of conveyance adopted, reasonably to guard against accidents and consequential injuries, and if they neglect to do so,

they are to be held strictly responsible for all consequences which flow from such neglect.¹

"The company is not an insurer of the absolute safety of the passengers as it is of goods which it undertakes to carry, but it is bound to exercise the highest degree of care to secure the safety of the passenger, and is responsible for the slightest neglect resulting in injury to the passenger; and this care applies to the safe and proper construction and equipment of the road, the employment of skillful and prudent operatives, and the faithful performance by them of their respective duties."²

¹ *Tuller v. Talbot*, 23 Ill. 358; *Railroad v. Manson*, 30 O. S. 451.

² *Ex R. R. Co. v. Dickerson*, 59 Ind. 321.

No. 417. Duty of passenger.—On the other hand, the law exacts of the passenger that, while traveling on the train, he exercise ordinary care and caution to avoid the injuries incident to that mode of travel. In legal contemplation he expects to take, and does take upon himself, the hazards of such danger as may occur to him without any want of care or diligence on the part of the company and its operatives.

From *Ohio & M. Ry. v. Dickerson*, 59 Ind. 321.

No. 418. Company not bound to carry passengers on freight trains.—A railroad company is under no legal obligation to transport passengers on its freight trains. The company confines its carriage of passengers to regular passenger trains, and its carriage of goods to its freight trains. But when the company assumes to carry passengers upon its freight trains, it is not bound to furnish to the passengers the same comforts and conveniences which are enjoyed on a regular passenger coach; but whether a railroad company undertakes to convey its passengers on a freight or passenger train, in a caboose or well-cushioned chairs, its duty is so to run and manage the train that passengers shall not, by its own carelessness, be killed or injured. On the other hand, he is presumed to know the manner in which such trains are ordinarily operated, and to assume any additional risk, aside from the negligence of the company, to which he may be exposed in consequence of his riding on a freight train.

From *O. & M. R. R. Co. v. Dickerson*, 59 Ind. 322; 56 Ind. 511; 26 Ill. 373; 53 Ill. 397; 58 Md. 147; 39 N. H. 297.

No. 419. Relation of carrier and passenger exists when.—The jury are instructed that the responsibility of the carrier towards the passenger begins when he presents himself for

transportation; it is not necessary that the passenger shall have actually purchased a ticket to create the relationship; the person intending to become a passenger becomes one, and entitled to all the rights as such, when he approaches the place of reception for that purpose; and if you find from the evidence that the plaintiff approached the depot and informed the ticket agent of his intention and desire to become a passenger, and the station agent directed him about the trains, you may then find that the relation of passenger and carrier begins.

Allender v. R. R. Co., 37 Ia. 270; *Cooley on Torts*, 770 (644). Purchase of ticket or payment of fare not necessary to create relation. *Wood's Ry. Law*, p. 1205.

No. 420. Railroads—Passengers—Duty of railroad company to furnish safe passage to passengers.—It was the duty of the defendant company, as a common carrier of passengers, to furnish a reasonably safe passage for its passengers going to and from its trains. And the law imposes an obligation on the part of the railroad company to take reasonable care that a person holding the relation of passenger going to, or coming from, its trains shall, while thus on its premises, be exposed to no unnecessary danger, or one of which it is aware, and requires it to provide for such passengers a reasonably safe passage to and from said trains. If you find from the evidence that the plaintiff, at the time of the injury, was returning from a train of the defendant's cars, where she had lawfully ridden, she would be entitled to such protection from injury while on the railroad company's platform as men of ordinary care and prudence would be accustomed to give persons under like or similar circumstances.

Nye, Judge, in *Clark v. N. Y., P. & O. R. R. Co.*, *Medina County*.

A common carrier is liable for any injury resulting from the slightest motion of his vehicle during the entrance or exit of a passenger. *Mulhaddo v. Brooklyn, etc. R. R. Co.*, 30 N. Y. 370; *Sherman & Redfield on Negligence*, Sec. 508.

No. 421. Negligence—Injury to passenger—Burden of proof.—"It being admitted that the defendant is a carrier of passengers, that, on the occasion mentioned in the petition, the plaintiff was a passenger on defendant's train, having paid his fare, it was the duty of defendant to carry him safely to the point of his destination without injury; and when it is shown that the defendant failed to carry the plaintiff safely to the place of his destination, this failure puts the defendant, *prima facie*, in the wrong, and the burden of proof devolves upon it to show that the injury was the result of a pure acci-

dent, and that it could not have been prevented by the exercise of the utmost care and skill which prudent men are accustomed to employ under similar circumstances."

From *Railroad Co. v. Mowery*, 36 O. S. 418.

No. 422. Negligence—Of passenger contributing to injury.—"Although the defendant did not exercise the degree of care required of it, yet, if the plaintiff was also in fault, and that fault contributed directly to produce the injury, he can not recover. His right to recover, however, is not affected by his having contributed to the injury, unless he was in fault in so doing."

From *Railroad Co. v. Mowery*, 36 O. S. 418.

No. 423. Duty to provide safe platform.—"It is the duty of the defendant to have its platform reasonably sufficient and safe in all respects, to be used by such persons as may have lawful occasion to use it. It is not necessary that it should be perfectly and absolutely safe; so great a degree of perfection is usually impracticable; but it must be reasonably safe and sufficient for all persons using it, who are themselves in the exercise of ordinary and reasonable care. If a barrier or guard is reasonably necessary to prevent persons, who are themselves in the exercise of ordinary and reasonable care, from falling from the platform to their injury, then a barrier should be placed upon it, or a guard should be placed to warn people of danger. Such lights as are necessary to render the use of the platform and the passage over it to the cars reasonably safe should be upon the platform, at the platform, at the time of the arrival of trains, and during the time the trains remain at the station."

Ex Quaife v. R. R. Co., 48 Wis. 516.

No. 424. Duty of carrier to passenger boarding train.—"It is the duty of a railroad company to use due care, not only in conveying its passengers upon their journey, but also in all preliminary matters, such as their reception into the car, and their accommodation while waiting for it: and, whether bound to render assistance in taking passengers aboard its cars or not, it is liable for the consequences of negligence in giving directions to passengers as to the mode of entering. Whether it was the duty of defendant's agent to have assisted plaintiff in getting on the car is a question for you to consider and determine from the evidence in the case; and for this purpose it is proper for you to consider the train and the car.

their distance from the platform and depot, the facility with which access could be had, the sex, age, and inexperience of the plaintiff, if these were known to defendant's agents, and all the facts and circumstances surrounding the case. When the carrier of passengers by railway does not receive passengers into the car at the platform erected for that purpose, and suffers or directs passengers to enter at out of the way places, it is its duty to use the utmost care in preventing accidents to passengers while so entering."

From *Allender v. R. R. Co.*, 43 Ia. 277.

As to duty to aged and infirm persons, *Sher. & Red. Negligence*, Sec. 508; 1 *How. Pr. N. S.* 67; *Wood on Railways*, Sec. 1363. Company must stop car at platform and must furnish proper platform for passengers. *Sher. & Red. Negligence*, Sec. 510.

No. 425. Must protect passengers from violence.—The defendant company must carry its passengers safely and properly, and the duty to so carry its passengers safely extends still further. There rests on the carrier the obligation and duty to protect its passengers from violence; if such violence can not be prevented by the highest degree of care, the carrier can not then be held responsible; if the carrier has used the care which the law requires—that is, the highest—then it is not liable. A carrier is responsible for injuries willfully or carelessly inflicted upon passengers by its servants engaged in the performance of duties within the general scope of their employment, whether the particular act was or was not authorized by the master. The defendant is not an insurer of the safety of its passengers against all the risks of travel, but is bound to use the highest degree of care, and when that is done, that is all that the law may exact of them.

See *Sherlock v. Alling*, 44 Ind. 184; *L. & C. R. Co. v. Kelly*, 92 Ind. 372. Some authorities seem to hold the carrier responsible for "violence and insults from whatsoever source arising." *Goddard v. R. R. Co.*, 57 Me. 202; 2 *Am. Rep.* 39; 1 *Kinthead's Code Plg.*, p. 204. For full discussion see same, Secs. 230, 231, and cases.

No. 426. Right to eject passengers.—"The jury are instructed that if they believe from the testimony that the plaintiff did not pay, or offer to pay the conductor in charge of the train, his fare from C. to W., or place of destination, and refused to pay the same on being requested so to do, then the conductor was justified in putting plaintiff off the train, and using only the necessary force to do so, at some regular station, or near some dwelling-house, as the conductor should elect. Yet if the jury further believe from the testimony that the conductor and others, agents and servants of the defendant, acting under orders from the conductor, forcibly

put plaintiff off from the train, and in so doing used unnecessary force, and unnecessarily beat, kicked, and bruised plaintiff while he was so on the train, then the jury will find for the plaintiff and assess his damages at such sum as they believe from the evidence to be a just compensation for the injuries sustained. . . ."¹

The defendant company had a right to prescribe rates for prepurchased tickets, and car rates when tickets were not purchased, for distances less than eight miles, and more than six miles, provided that neither of such rates exceeded the maximum rate allowed by law. Where a passenger enters the cars without having purchased a ticket, and when payment of the fare is demanded is persistently refused, after giving such person a reasonable time to determine whether or not he will pay, such person has no right to remain on the train, or to claim the rights of a passenger, but may be treated as a trespasser. The conductor may lawfully eject such a person, provided he uses no unreasonable violence and does not expel him at a place where he would be exposed to serious injury or danger.²

It is not only the right, but the duty of a conductor to expel from a train a drunken, unruly, boisterous passenger, but when such a person endangers by his acts the lives of other passengers, it is the duty of the conductor to remove such passenger to protect others from violence and danger. This right must be reasonably exercised, and not so as to inflict wanton or unnecessary injury upon the offending passenger, nor so as to needlessly place him in circumstances of unusual peril.³

¹ From *Perkins v. R. R. Co.*, 55 Mo. 201, 208. Company may make rule requiring conductor to eject passenger for non-production of ticket. 26 O. S. 580; 29 O. S. 219; 56 N. Y. 296. For full discussion see *Kinhead's Plg.*, Secs. 230, 231. Unreasonable violence must not be used, or he must not be ejected at a place of danger. 39 O. S. 453.

² *Railroad v. Skillman*, 39 O. S. 444.

³ *Railway v. Valleley*, 32 O. S. 345. Common carrier may refuse, without liability, to carry a person intoxicated. *Pittsburgh, etc., R. R. Co. v. Vandyne*, 57 Ind. 576. Neither is he bound to carry anyone whose conduct is riotous or boisterous. *Wood on Railroads*, Sec. 297.

No. 427. Railroads—Passengers—Duty of railroad company to passenger falling from train.—If a company has notice that one of its passengers has fallen from the end of its train, the duty is incumbent upon it to exercise due care to prevent his death or injury from a following train, and its failure thus so to do renders it liable if death is caused by a following train running over such passenger while he lay unconscious or helpless on or near the track.¹

¹ From *Railroad Co. v. Kassen*, 49 O. S. 230.

The case is narrowed, then, to the question whether two facts exist. First: was the death of this young man caused by a fall from the first train, or was it caused by the train which ran over his body? If it was caused by the first train, or if by the fall he was put in such a condition that his death immediately ensued, or must have ensued from the injury thus sustained, then the plaintiff can not recover. If you find that by the fall the death was not caused, and would not have ensued, but that the death was because of the train which followed, then you will proceed to try the question, what notice the railroad company had of the actual condition of that young man upon the track. Notice to the brakeman would be notice to the company. It must be actual notice to the brakeman. He must have heard from someone, or must have seen that the young man would be likely to be in the condition in which, at this point, if you reach this point in the case, you must find that he actually was upon the track. You must determine as to the sufficiency of the notice from the circumstances in the case, as to where the notice was given, under what circumstances, the rapidity with which the train was proceeding, and all those circumstances which you may find to have been presented to the brakeman, if you do find that they were presented, and then judge if, from the facts thus presented, a brakeman of ordinary, average intelligence and prudence would conclude that K. was in a condition upon the track, or so near the track as that injury would necessarily follow from a following train.²

² Wm. H. Taft, J., in C., H. & D. R. R. Co. v. Kassen, 49 O.S. 230. Notice to brakeman in such case is notice to the company. R. R. v. Ranney, 37 Ohio St. 665; 30 Ohio St. 451. As to duty and care in such case see Kerwhacker v. R. R., 3 Ohio St. 172.

No. 428. Alighting from train—Duty of company as to stopping train for passengers to alight.—(The negligence charged is that plaintiff was not allowed proper and reasonable time and opportunity to alight from the train at F. station.)

If the train stopped at F. station at all, then it was the duty of the servants and agents of defendant to stop long enough to allow all passengers for that station to have a reasonable time and opportunity to alight from that train. If it did not stop at all, then plaintiff would have no right to try to get off a moving train.

Now, that is a question of fact for you to determine from the evidence, whether the train stopped, and whether passengers were allowed a reasonable time and opportunity to alight from the train with safety. If the plaintiff has established that fact by a preponderance of the evidence, and the

evidence shows that the train did stop, and if plaintiff has satisfied you by a preponderance of the evidence that he was not allowed a reasonable time and opportunity to alight from that train, he has made out one branch of the case, and, in the absence of any other testimony, is entitled to recover. If you find that plaintiff was allowed a reasonable time and opportunity to alight safely from the train, of course that is the end of the case, and your verdict should be for the defendant without further inquiry.

But, if the evidence satisfies you that the train stopped and he was not allowed a reasonable time and opportunity to alight in safety, and he was thereby injured, then, in the absence of other testimony, he would be entitled to recover. If it be established, however, gentlemen, that the train did stop, it is for you to determine from the evidence what was a reasonable time and opportunity for him to safely alight.

If they stopped, but did not stop a sufficient length of time to allow plaintiff to alight from the train, and he was thereby injured, that would be negligence on their part which would make the company liable, unless the party injured was guilty of negligence on his part.

From *C., H. V. & T. Ry. Co. v. Newell*, Supreme Court, No. 1313; 12-478. Price, J.

See *ante*, No. 424. A carrier must allow his passengers a reasonable time in which to get on and off the vehicle. *E. Bendorf v. Brooklyn, etc., R. R.*, 69 N. Y. 195; *Fairmount, etc., R. R. v. Stutter*, 54 Pa. St. 375.

No. 429. Same continued—Contributory negligence.—You will then inquire whether or not plaintiff was guilty of any want of care, or guilty of contributory negligence, whether he contributed to his own injury by want of care.

If the train stopped, they must have stopped a reasonable length of time, and if they did not stop at all, then he would have had no right to try to alight from the moving train, and if he did so, or attempted to do so, he would be guilty of contributory negligence, and it would preclude his recovering, and it makes no difference that he would be put to inconvenience by being carried past the station, because he was bound to exercise ordinary care and prudence, and it would not be ordinary care and prudence to attempt to get off from a moving train, so, if you find that he did so, he ought not to recover, because guilty of contributory negligence; and if he passed out from the coach and upon the platform intending to alight from the train, and the servants and agents of the company did not give sufficient time for him to alight from the train, and then he attempted to alight while it was moving, in that case he would be guilty of contributory negli-

gence which would preclude his right of recovery. If he passed out of the coach and upon the platform, and the train passed on before he had time to alight, it was his duty, as soon as he reasonably could, to return to the coach, and if he failed to do so, and for that reason was thrown from the train while it was in motion, he would be guilty of contributory negligence; but *if he passed out of the coach and upon the platform, and the train moved on before he had a reasonable opportunity to return to the coach*, and he was thrown from the train, in that case he would not be guilty of contributory negligence, and could recover from the company.

Now, it will be for you to determine which side has the burden of proof as to contributory negligence. If the evidence introduced by him raises the presumption that he was guilty of want of care and prudence, then the burden of proof is thrown upon him. If the evidence introduced by him does not raise such presumption, then the burden of proof is on the defendant. But, however it may be, if the evidence satisfies you that he was guilty of such want of care and prudence, that precludes his right of recovery. If you find negligence on the part of the servants and agents of the company, and that he was injured thereby, and that he was not guilty of such want of care and prudence on his part, it entitles him to recover.

From *C., H. V. & T. Ry. Co. v. Newell*, Supreme Court, No. 1313 (12-478). Price, J. If a passenger by the negligence of the company is carried beyond the station, he can recover for the inconvenience, loss of time, etc., but if he gets off while the train is moving, he does it at his own risk. *Jeffersonville R. R. Co. v. Hendricks*, 26 Ind. 228; 26 Ind. 459; 23 Pa. St. 147; 36 Ill. 467.

No. 430. Injury to a conductor riding on train other than his own with consent of conductor in charge.—In *Railway Company against Robert Bycraft* (Supreme Court, unreported), the plaintiff was a conductor who boarded a train other than the one of which he was conductor, and, while riding thereon, was injured by a collision. The question at issue was whether he was a passenger on such train at the time of his injury, and whether he could recover for negligence of the conductor of such train.

J. R. Johnston, J., charged the jury as matter of law: That if you find that plaintiff was injured by reason of the negligence and want of care on the part of the conductor of train 37, and you also find that the plaintiff, at the time he received his injury, was upon that train with the consent, permission, and knowledge of the defendant, and with the consent, permission, and knowledge of the conductor of this train 37, but that at that time he was in the discharge of no duty incident

to his employment, and was not engaged in discharging any of his duties as a conductor upon that road, or any duty upon that train, and was merely riding from A. to his home at B., with this consent, knowledge, and permission on the part of the defendant and of the conductor, that the negligence of the conductor in charge of train 37 would be the negligence of the defendant, and would not be the negligence of a co-employee, or fellow-servant, so as to defeat a recovery in this action, provided you find the plaintiff otherwise entitled to recover. If you have found the plaintiff to have been thus upon this train, then it became and was the duty of the defendant to exercise towards him ordinary care in the running and operating of that train, and this would be the degree of care and the degree only which was incumbent upon the defendant by reason of the relation which existed from the situation of the parties, and the relation they sustained toward each other at that time. If the defendant failed and neglected to exercise that degree of care towards the plaintiff, and for his safety, for such failure the defendant would be liable, provided the plaintiff was in the exercise of proper care on his own part, and if this conductor of train 37 failed and neglected to exercise towards the plaintiff that degree of care, and by reason of this failure the plaintiff was injured, the defendant would be liable therefor.

"If you have found that the defendant was negligent in running and operating train 37, and find that it did not exercise towards the plaintiff ordinary care for his safety, and that, by reason of such failure, and as a direct and proximate result thereof, the plaintiff sustained his injuries, and have also found that at the time he received his injury he was upon this train, with the knowledge, permission, and consent of the defendant and said conductor, but was discharging none of the duties incident to his employment at that time, and discharging no duty required of him by the defendant on that train or otherwise, and was in the exercise of ordinary care himself, then the plaintiff would be entitled to recover, even though you may find at that time the relation of master and employee existed between the defendant and the plaintiff."

Johnston, Judge, in *Bycraft v. Ry. Co.* Judgment affirmed by Supreme Court.

This case is distinguished from *Manville v. V. & T. R. R. Co.*, 11 O. S. 417, in that in the *Manville* case the conductor was in the discharge of a duty, being on the train going to his place of work. Judge Johnston's charge was approved by both Circuit and Supreme Court. See as in point, *Packet Company v. McCue*, 17 Wall. 508, where it was left to jury to say whether the employment had ceased.

The *Manville* case specially holds that the plaintiff must be in the employ at the time of the injury.

No. 431. Injury to one assisting, caring for a fellow sick passenger while carrying the latter from one car to another—Liability hinging upon duty of railroad company towards sick passenger—Whether he was directed or permitted by officials to assist in caring for passenger.—If the jury find from the evidence that the plaintiff, pursuant to the direction or request of the conductor of defendant's train, attempted to assist in the carrying of S. from the passenger coach to the caboose, and that, in so doing, he used reasonable care, and was injured by reason of exposure to a danger of which he was not aware, and of which the servants of defendant, if exercising only reasonable care, would have known of and either protected him from or gave him timely and adequate warning of; then in that case, defendant is liable for the injury resulting from exposure to such danger.

(a) *Danger in passing from one car to another.*

If you find that plaintiff was exposed to a danger in attempting to pass from the coach to the caboose, of which he did not know, and the servants of the defendant did know, or should have known, and it was such a danger as passengers, ordinarily, would not anticipate, then, and in that case, it became the duty of the defendant, by its servants, to give plaintiff timely and adequate warning of such danger; and failure so to do, if reasonably avoidable, was failure to use ordinary care, and for which defendant is liable.¹

(b) *Ordinary care in such cases.*

What I mean by ordinary care and prudence, as the words are used in this charge, is that degree of care and caution which persons of ordinary care and prudence are accustomed to use and employ under the same or similar circumstances.

The amount of care required will depend on the circumstances of each particular thing to be done, and will vary as the circumstances of each particular transaction may differ; it is to be such care as prudent persons are ordinarily accustomed to exercise under the peculiar circumstances of each case; if called into exercise under circumstances of peculiar peril, a greater amount of care is required than where the circumstances are less perilous, because prudent and careful persons, having in view the object to be attained, and the just rights of others, are, in such cases, accustomed to exercise more care than in cases less perilous; the amount of care is increased, but the standard is still the same; it is still nothing more than ordinary care under the circumstances of that particular case; the circumstances, then, are to be re-

¹ See Wood on Railroads, Sec. 301; *Gee v. Met. R. R.*, L. R. 8 Q. B. 161.

garded in each case in determining whether ordinary care has been exercised or not.²

(c) *Lack of knowledge of relative positions of platform of cars.*

In determining whether plaintiff exercised or failed to exercise ordinary care in attempting to pass from the coach to the caboose, you will consider his knowledge or lack of knowledge of the relative positions and elevations of the platforms from and to which he so attempted to pass.

(d) *Injury must result from direct act of negligence of railway officials.*

To entitle the plaintiff to recover for a failure or neglect of defendant to exercise such reasonable or ordinary care as indicated, it must appear, from the evidence in the case, that the injury was caused and occasioned by and as a direct result from such negligence or want of attention on the part of defendant, and was not simply the result of an accident; and if the jury believe, from the evidence, that the injury resulted from an accident which could not have been seen and guarded against by the use and exercise of ordinary care and prudence on the part of defendant, then the plaintiff can not recover in this action.

(e) *If injury resulted from mere accident.*

But if the injury was the combined result of an accident and the defendant's negligence, or want of ordinary care, as aforesaid, and the accident would not have occurred but for such negligence or want of care by the defendant, and the danger could not have been foreseen or avoided by the exercise of ordinary care and prudence on the part of the plaintiff, the defendant, if guilty of such negligence or want of ordinary care, as aforesaid, would be liable for the injury to the plaintiff directly caused or occasioned thereby, if such did occur.

(f) *Railway officials giving notice of dangers of passing from one car to another.*

If the railroad company, through its conductor or brakeman, gave timely notice or warning to the plaintiff of the danger of stepping from one platform to the other, and the plaintiff misunderstood the notice or warning, through no fault of the defendant, or failed to hear the notice or warning, and made the misstep and fell and was injured, there can be no recovery in this case against the defendant.

If the jury find, in this case, that S. heard the notice and warning from the conductor or brakeman to look out in step-

² As to degree of care, see *McIntyre v. N. Y. Central R. R. Co.*, 34 N. Y. 287.

ping across from the coach to the caboose, and thereafter S. had time to make the step, as he understood the notice or warning, but, through misunderstanding of the notice, made a misstep and fell and was injured, then there can be no recovery in this action, and your verdict should be for the defendant.

(g) Passenger voluntarily assisting sick passenger.

If the jury find in this cause that the plaintiff, whilst upon said train, voluntarily and without the direction, knowledge, or request of the conductor of said train, left said passenger coach to aid and assist in carrying a sick or disabled passenger from said passenger coach across into said caboose, and whilst so doing, in stepping from the platform of the passenger coach to said caboose, he slipped or stepped short and fell, and received the injury complained of, in consequence of the distance between said caboose and said passenger coach being more than he expected, or of the unequal height of the platforms, or owing to his view being hidden by the body of the man he was carrying, then there can be no recovery in this action, and your verdict should be for the defendant.

(h) Liability of company for directions of conductor as to care of sick passenger.

If the jury find from the evidence in this case that a passenger in one of said passenger coaches was taken sick or ill, or became disabled, through no fault or negligence or want of proper care on the part of the railway company, and, in order to find a place where said sick or disabled passenger could lie down, that he might be specially and properly attended to, the conductor of said train, upon inquiry of him if there was such a place, suggested or said that there was a caboose at the rear of said train, having seats lengthwise of the sides thereof, to which he might be taken if desired, and thereupon said plaintiff and others, friends of said sick or disabled passenger, proceeded to carry him to said caboose, and in so doing said plaintiff and others, before stepping from said passenger coach to said caboose, were warned to be careful in stepping across to the caboose platform, and thereafter the plaintiff, in stepping across, stepped short or slipped and fell between the platforms of the caboose and the passenger coach and was injured, then the plaintiff can not recover in this action, and your verdict should be for the defendant.

(i) Duty of railway to sick passenger.

Said railroad company, having provided comfortable, safe, and fit passenger coaches for the plaintiff, with all the usual, proper, and ordinary attachments and conveniences for public travel, was not obligated or bound to provide, in addition

thereto, a car specially designed for the purpose of carrying sick or disabled passengers thereto or therein; and if you find that the plaintiff voluntarily aided and assisted in the carriage of a sick or disabled fellow-passenger from one of said passenger coaches to said caboose, even though with the permission of the conductor of said train, he thereupon took upon himself and assumed all the usual and ordinary risks, dangers, and perils of such service arising from the differences between the height of the platforms of said coach and said caboose, and the space between the same; and if, in the doing and performance of said service on his part, he was injured, through no willful act or misconduct on the part of said defendant or its employees, then there can be no recovery in this action by the plaintiff.

If the jury find from the evidence in this case that the conductor of said passenger train permitted or consented that said sick man might be removed from said passenger coach to said caboose, he did not thereby direct such removal, nor direct nor invite the plaintiff to help or assist in the removal of said sick man from said passenger coach to said caboose; and if the plaintiff volunteered to, or was requested by said sick man or his friends, to help carry said sick man from said passenger coach to said caboose, he thereby assumed all the usual and ordinary risks and perils attendant upon such service, and the defendant could not be held liable for any injury received by plaintiff, which was one of the usual and ordinary risks and perils of such service.

If the jury find from the evidence in this case that the injury to S. was accidental and not from any want of proper care and precaution, under the circumstances, on the part of himself or the railroad company, then there can be no recovery in this action, and your verdict should be for the defendant.

³ Snook, Judge, in *Railway Company v. Salzman*, 52 O. S. 558. "A railway company is under obligation to give such care to a passenger who becomes sick on its train as is fairly practicable with the facilities at hand, without thereby unduly delaying its trains, or unreasonably interfering with the safety and comfort of its other passengers." As to degree of care in, see *McIntyre v. N. Y. Central R. R. Co.*, 34 N. Y. 287. As to duty to care for sick passengers, see *A. T. & S. R. R. Co. v. Weber*, 33 Kan. 543; *Connolly v. Crescent City R. R. Co.*, 41 La. Ann. 57.

No. 432. Negligence of sleeping-car employee—Railroad company presumed liable for injury—Burden of proof.—"The burden of proof is on the plaintiff to show that he was injured by the defendant's negligence, either in not providing safe and suitable cars, or in not properly inspecting and taking care of them. A mere statement that a person was injured while riding on a railway, without any statement of

the character, manner, or circumstances of the injury, does not raise a presumption of negligence on the part of the railway company. But if the character, manner, or circumstances of the injury are also stated, such statement may raise, on the one hand, a presumption of such negligence, or, on the other, a presumption that there was no such negligence. If the plaintiff was in fact injured while sitting in his proper place by the falling of the upper berth upon his head, while said berth ought to have remained in place above, such fact raises a presumption in this case of negligence, for which the defendant is liable. If you find that there was no defect in the road, or in the car, or the mechanism used, yet if, upon the evidence in this case, you find it reasonable to presume that the accident happened by reason of the upper berth not having been properly fastened in its place, or by reason of the persons having charge of the car having failed to observe that it had become loosened, if such insecure condition would have been observed by proper diligence, you have a right so to presume, and you would then find the defendant guilty of negligence. If, on the other hand, in such case you find it equally reasonable to presume that the fastening of the berth was loosened by some other person, not those in the employment of the defendant, and such insecure condition would not be observed by proper diligence on the part of the persons having charge of the car, you have the right so to presume, and in that case would find that the plaintiff had failed to make out a case of negligence against the defendant. The plaintiff is entitled to damages for injury traceable to the defendant's fault, but not for injury caused by his own act."

From *Railroad Co. v. Walrath*, 38 O. S. 461.

(4) Railroads—Rules Governing Employees.—

No. 433. Railroads—Rules—Railroad company may make rules governing conduct of employee—Duty of employee with reference to.—"A railroad company has the right to make such rules and regulations for the conduct of its servants and agents while engaged in its service as, in its judgment, are reasonable and proper, as would conduce to the safety and comfort of its employees; and all servants, while engaged in such service, with a knowledge of such rules and regulations, are bound to act in conformity therewith; and if injuries are sustained by them while acting in violation thereof, no recovery can be had of the company therefor, if

such violation was the cause of, or materially contributed to, the injury."

Wolsey v. Railroad Co., 33 O. S. 227. It is the duty of a railroad company to make regulations for protection of employees from dangers. *Railway Co. v. Lavalley*, 36 O. S. 221. This duty is satisfied by a reasonable provision for a particular case instead of a rule. *Railway v. Zepperlein*, 1 O. C. C. 36. The statute requires rules to be made and published. R. S., Sec. 3334.

No. 434. Railroads—Rules—Liability of railroad company for violation of rules by employee.—"The company is not liable for an injury which happens to an employee in consequence of a disregard of its plain instructions, even though other employees also disregarded the same.

"If a railroad company in the exercise of its discretion adopts a rule for the conduct of its employees while engaged in its service, and intended for their personal protection against injury, and an employee, knowing the rule, neglects to avail himself of its provisions, and in consequence of such neglect sustains an injury, the company can not be held liable therefor."

From *Wolsey v. Railroad Co.*, 33 O. S. 227.

An employee has no right of action against the company for an injury incurred while breaking a rule of the company. *Pilkington v. R. R. Co.*, 70 Tex. 226; 83 Ky. 589; *Wood on Railroads*, Sec. 382.

No. 435. Railroads—Rules—Rules of railroad company—Effect of, in negligence case.—As bearing upon the second question, to wit: The contributory negligence of the decedent, it is admitted in the pleadings in this case and not controverted at the trial, that rule No. —, referred to in the pleadings, was printed upon the time-table in use by the company, and from this fact it is claimed that such a rule was in effect at the time of the injury. The plaintiff, by his reply, admits the publication of the rule in this manner, but states that the rule was habitually disregarded to the knowledge of the defendant company. Railroad companies, like other employers, have the right to prescribe rules for the government and for the protection of their employees, and in case an employee disregards a rule so prescribed, such regard might be, and in this case would be, a voluntary assumption of a risk by the employee.

However, the mere fact that the rule in question was printed upon the time-tables is not conclusive evidence that the rule itself was in force. A railroad company may waive its rules and may change them by its conduct otherwise than by an express revocation in the same manner in which they are originally prescribed.

Hence, if you should find in this case that the rule originally printed and published as part of the time-table was either never intended to be regarded and obeyed by the employees of the company, that is to say, if the railroad company never intended that the rule should be obeyed, or if you should find that, subsequent to its publication as a rule, the employees of the company were not furnished with the means of carrying the rule into effect, or that the railroad company subsequently permitted its employees to disregard it, these facts may be taken into consideration by you, together with the fact of the publication of the rule, in considering the question whether or not rule No. — was in force at the time of the accident.

If you should determine that it was not in force, that part of the issues relating to the rule will be immaterial in the case.

If you should find, however, that the rule was in force, and that M. B. disobeyed and disregarded it, his disobedience and disregard would in law amount to a voluntary assumption of a risk, and if his position combined with the defendant's negligence to cause the injury, his administrator could not recover in this action.

W. T. Mooney, Judge, in *Chicago & E. R. R. v. Purviance*. See ante, No. 434.

(5) Railroad Company and Its Employees.—

No. 436. A complete charge in the case of negligence against railroad company for injury to brakeman.—(Omitting statement of pleadings.) Now, gentlemen, these are in brief the claims of the parties, and it is with reference to these claims of the parties that you are to consider the evidence and determine the issues in this case.

The burden of proof to show negligence on the part of the railroad company is upon the plaintiff. Negligence, which is the gist of the action, is not to be presumed, but it must be proved. There is no presumption that the railway company was negligent from the mere fact that the plaintiff was injured while he was in the employ of the company, or while he was performing his duty as an employee of the company. To entitle the plaintiff to recover damages it is incumbent upon him to show affirmatively and by a preponderance of evidence that the company was negligent in the respect complained of—that is, in omitting to fill the spaces between the ties outside of the rails at the place where the injury

occurred; and it is incumbent upon the plaintiff to show by a preponderance of the evidence that his injury resulted from such alleged negligence. He can not recover if the injury was produced by any cause for which the railroad company in law is not responsible. He can not recover if, by his own want of care, he contributed in any degree to his injury. Now, if the plaintiff received his injury in consequence of the negligence of the company, under the rules which I shall give you, and was himself free from any fault contributing to the injury, then he is entitled to recover such damages as the proof shows he has sustained; but if the injury was not caused by negligence on the part of the railway company, or if the plaintiff by his own want of care contributed to the injury, then he is not entitled to recover, and in that case your verdict must be for the defendant. The two principal questions, then, in the case which you are to determine from the evidence are:

First. Whether the railway company was negligent in omitting to fill the spaces between the ties at the place of the injury, and whether the injury was caused by such negligence.

Second. Whether the plaintiff was himself free from fault contributing to the injury.

The relation between the plaintiff and the defendant was that of master and servant, and the law imposes certain duties upon each of the parties to that relation—both upon the master and also upon the servant. It was the duty of the railway company—the master—to use ordinary and reasonable care in providing for its employees a safe and suitable place in which to do their work; and ordinary and reasonable care is such care as ordinarily prudent persons or corporations are accustomed to exercise under the same or similar circumstances. The company is not required to use extraordinary care, nor is it required to do what is unreasonable or impracticable, taking into consideration all the circumstances. The company does not guarantee the absolute safety of its employees; it is not an insurer of its employees. It is required only to use what would be reasonable care under all the circumstances of the case.

You will first determine from the evidence how the injury occurred. Did it occur by the plaintiff having his foot caught between the ties—in the spaces between the ties—while attempting to uncouple the cars, or did it occur in some other way? If it occurred as alleged by the plaintiff, did the company fail to use reasonable and ordinary care in omitting to fill the spaces between the ties at the place where the injury occurred? Now, gentlemen, that is a question of fact purely

which you must determine from all the evidence in the case. Everything must be considered; the place where the injury occurred; all the objects and purposes to be accomplished in the construction of the defendant's roadbed; the duty of the company to its employees; the safety of the roadbed for trains to pass over it, and what would be practicable and reasonable in view of all the circumstances of the case. You may consider whether or not the roadbed of the defendant, at the point of the injury, was constructed in accordance with the regular mode of construction at similar places adopted by the company, if there was such a regular mode of construction. If the roadbed at the place of injury was constructed in accordance with such regular mode, and the plaintiff knew this or might have known it by the exercise of reasonable care, then the company is not chargeable with negligence. But if there was no regular mode of construction at similar places, or if the mode of construction at the place of the injury was materially different from such regular mode of construction, then you may take that fact into consideration, in connection with all the other evidence, in determining whether there was any negligence. The inquiry is, whether, under all the circumstances and all the facts, the company did or did not use reasonable care in omitting to fill these spaces at the place of the injury.

If a preponderance of the evidence does not show that the company omitted to use reasonable care, or if the preponderance of the evidence does not show that the injury resulted from the failure to fill the spaces between the ties, then there can be no recovery, and your verdict in that case must be for the defendant. But if you find from a preponderance of the evidence that the company failed to use reasonable care in omitting to fill the space between the ties, and that the injury resulted from such omission, you will then inquire whether the plaintiff was himself free from fault contributing to the injury.

It was the duty of the plaintiff as a servant of the company to use ordinary and reasonable care for his own safety—that is, such care as ordinarily prudent persons usually exercise in the same or similar circumstances. It is a rule of law that a servant, when entering into the employment of another, takes upon himself—assumes—all the dangers, all the perils, and risks which are ordinarily and naturally incident to the service which he engages in. If an injury happens to him from such a natural and ordinary peril, the master is not liable. But if the peril from which he is injured is an unusual peril—an extraordinary peril—and he has no knowledge

of it, and could not have known it by the exercise of proper care, then the company is responsible for an injury to him arising from such unusual peril, if it happened through the failure of the company to use ordinary and reasonable care.

If the plaintiff, at the time of doing the work and receiving this injury, was careless, or inattentive, and if he might, by the exercise of reasonable care, have prevented or avoided the injury, then, in law, he is regarded as having brought the injury upon himself, and he can not hold the company responsible, notwithstanding any negligence on the part of the company. If the plaintiff knew, or, by the exercise of reasonable care, might have known that the spaces between the ties were not filled, and he was of such age and experience as to be able to understand and appreciate the danger of walking upon or over these ties while doing his work, then he took upon himself the risk of injury from working at that place, and can not hold the company responsible. It is not necessary that the defendant should show that the plaintiff had actual knowledge of the condition of the roadbed; it is sufficient if a state of facts is shown from which knowledge upon his part may reasonably be inferred. It is for you to say from all the evidence—weighing it all, and giving to every fact and circumstance such weight as in your judgment it is entitled to—whether the plaintiff knew of the condition of the roadbed at this point, or might, by the exercise of proper care, have known it, and whether or not he understood the danger.

The burden of proof, as I have said to you, to show negligence upon the part of the company is upon the plaintiff. The burden of proof to show contributory negligence upon the part of the plaintiff is upon the defendant, unless, from the plaintiff's own testimony, it may fairly be inferred that he was negligent. If, upon the plaintiff's own testimony, a presumption may fairly arise that he was negligent, then the burden is upon him, the plaintiff, to remove that presumption.

In determining whether the plaintiff contributed to his injury by his own want of care, you will consider what he knew, or should have known, as to the condition of the roadbed, and as to whether or not the spaces between the ties were filled; what he saw at the time of the injury, or should have seen; the manner in which he did his work, and all the circumstances and surroundings.

If you find that the plaintiff was without fault, and that his injury was caused by the alleged negligence of the company, you will then render a verdict in his favor; and in that case it will be necessary for you to determine from the evi-

dence what damages he is entitled to receive; and, of course, you will understand that what I say to you upon the subject of damages is only to be considered in the event that you find for the plaintiff.

The measure of plaintiff's damages is compensation for the actual injury received by him. You can not allow anything for the purpose of punishment, or by way of example. The measure of plaintiff's damages, in case he is entitled to recover, is compensation—what will fairly and reasonably compensate him for the injury, nothing more, nothing less. In determining the amount of compensation, you will consider the pain which the plaintiff has suffered, physical or mental; the nature, extent, and character of the injury; the effect of the injury upon his capacity to labor and earn a living, and all the circumstances.

In disposing of all the questions in the case, you must be governed entirely by the evidence, and not let your judgment be influenced by any other consideration.

You will not consider any evidence that has been received and subsequently excluded by the court; such evidence is not in the case for any purpose. The evidence of what are the practices of other railroads in the matter of filling or not filling the spaces between the ties outside of the rails was withdrawn from your consideration, and the introduction of further evidence upon that subject by either party was not permitted. All this evidence—all the evidence upon that subject—is entirely out of the case, and you are to pay no attention to it.

The question whether or not the defendant is liable, and if so, the extent and amount of its liability must be determined in this case in the same manner and under the same rules that would govern if the defendant was an individual. The liabilities and duties of master and servant are the same under the same circumstances, whether the master is an individual or a corporation.

Under these rules you will consider and weigh all the evidence calmly and deliberately, without passion or prejudice, and if you find for the plaintiff, you will award to him such damages as shall be a fair, reasonable, and just compensation for his injuries.

But if, on the other hand, you do not find that the defendant is liable, you will then say by your verdict that you find for the defendant.

In accordance with these instructions, you will be furnished with two blank verdicts—one in favor of the plaintiff and one in favor of the defendant. The material part of the

verdict for the plaintiff reads as follows: "For verdict find and say that we find for the plaintiff and assess his damages at the sum of ———." If you find for the plaintiff, you will fill the blank in the verdict, and your foreman will sign it. The material part of the verdict for the defendant is: "For verdict we find and say that we find for the defendant." If you find for the defendant, your foreman will sign that verdict.

Isaac P. Pugsley, Judge, in *T. C. & C. Railway v. Frick*. Affirmed by Circuit and Supreme Courts, 51 O. S. 575.

"It is the duty of a railroad company to lay its track and roadbed and to construct bridges and culverts and embankments in such a manner as to render it safe for the use of the employees as well as for the use of the public." 39 Am. & Eng. R. R. Cases, p. 332; *Goheen v. Texas & P. R. Co.* (C. C.), 3 Cent. L. J. 382; *Chicago & N. W. R. Co. v. Sweet*, 45 Ill. 197; *O'Donnell v. Allegheny Val. R. Co.*, 59 Pa. St. 239; *Brickman v. South Carolina R. Co.*, 8 S. Car. 173.

The company is also bound to employ due care in maintaining and keeping the roadbed in a condition suitable for the use of its employees. *Goheen v. Texas & P. R. Co.* (C. C.) 3 Cent. L. J. 382; *Central R. Co. v. Mitchell* (Ga.) 1 Am. & Eng. R., Cas. 145; *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441; *Drymala v. Thompson*, 26 Minn. 40; *Kansas City, St. J. & C. B. R. Co. v. Flynn*, (Mo.) 18 Am. & Eng. R. Cases, 23; *Houston & T. C. R. Co. v. Dunham*, 49 Tex. 181.

No. 437. Railroad company — Duty as to furnishing employees — Inadequate force, etc.—And first, as to the alleged negligence of the company in failing to equip this engine and train of cars with a sufficient number of competent employees. It was the duty of the railroad company to use ordinary and reasonable care to furnish an adequate number of competent employees to properly manage the engine and train of cars upon which the plaintiff was working; that is, it was the duty of the company to use such care in that respect as ordinarily prudent persons or corporations engaged in like business usually exercise under the same circumstances. And the question now for you to determine from the evidence is: did the company exercise such care? Were the engine and train of cars in question furnished by the company with a sufficient number of employees who were charged with the duty of coupling cars and otherwise properly handling the train, and who were competent and were expected to perform these duties? If this engine and train of cars were so furnished with an adequate number of such employees, then the company is not chargeable with fault for omitting to send out upon the engine upon the morning of the injury, in starting from ———, a conductor and brakeman. The inquiry is: whether, at the time of the injury, the engine and train were sufficiently and properly manned for the purpose of performing all the duties that

usually appertain to the operating and managing an engine and train under such circumstances. If this engine and train of cars was so adequately and sufficiently manned, then, of course, the company was not negligent in that respect.

(a) *Same continued—Must be proximate cause of injury.*

But if you find from the evidence that the train was not furnished with an adequate force of men, you will then inquire whether the failure to furnish this train with an adequate force of men caused the injury. To make the defendant liable for the injury, the inadequate force of men must have caused or occasioned the injury, and it must be the proximate cause of the injury. And this is a question of fact for you to determine from all the evidence in the case. Was the failure to equip this train with an adequate force of men, if such failure existed, the immediate and proximate cause of plaintiff's injury? If the plaintiff was without fault in attempting to make the coupling of these two cars, and he was injured by reason of the failure of the company to furnish an adequate force of men to properly protect him against injury—such as by giving signals, to the engineer, or otherwise—then the failure to furnish an adequate force of men was the proximate cause of the injury. But if the injury did not result from the absence of a sufficient force of men, naturally and in the usual course of events, or if the company could not reasonably have anticipated that in consequence of the absence of sufficient force the plaintiff would receive an injury, then the absence of such force was not the proximate cause of the injury. Of course, as you will readily see, it would make no difference what fault the company committed with reference to this force of men, unless such fault directly contributed to produce the injury, and, as I have said, it is a question of fact which you must determine from all the evidence in the case.

(b) *Same continued—Knowledge of plaintiff.*

But it is claimed by the defendant that, even if the force of men who were operating this train of cars was inadequate, the plaintiff, under the circumstances of this case, took upon himself the risk of injury from that cause, and can not now hold the company responsible for an injury received from that cause. That is the claim on the part of the defendant.

The rule upon that subject is this: If the servant of a railroad company has a full knowledge of any omission of duty or neglect on the part of the company, and with such knowledge—notwithstanding such knowledge—continues in the service of the company without making any objection, or without using any exertions to have the omission of duty or

neglect remedied, he thereby takes upon himself the risk of injury arising from such neglect and waives the right to recover of the company for the injury.

If the plaintiff in this case knew, at the time the engine left —, on the morning of —, that the engine or train was not to be equipped—knew that it was not then equipped, and was not thereafter to be equipped during the performance of the work—with a conductor or with brakemen for the work to be done upon that day, and if he knew that his safety in the performance of his duty would be imperiled, or that the hazards of the service would be increased by the absence of the conductor or brakemen, and if, with such knowledge, he went along with the engine without making any objection or complaint, then he can not now complain of the absence of a conductor or brakemen.

To prevent him from recovery for that reason it must appear that he knew that the train could not be safely and properly managed without the conductor or brakemen; or, in other words, he must know that it was negligence on the part of the railroad company to fail to provide the engine and train with a conductor or brakemen.

In this connection I will read to you, and give to you as the law of the case, two special requests or instructions that are made by the defendant:

1. The jury is instructed if they find from the evidence that the plaintiff, upon the day in question, proceeded on his train as fireman, knowing that there was no conductor or brakemen in charge of the train, and that he would be required to perform the duties ordinarily performed by such conductor and brakemen, then he assumed all the extra risks incident to such employment, and thereby waived any obligation on the part of the company to furnish a conductor and brakemen for such train.

2. If the plaintiff knew when he started on this train on the morning in question that there was no conductor and brakemen in charge of the same, and that he would be required to do the duties of a brakeman, he had a right to abandon the service and refuse to proceed without such conductor and brakemen, and his refusal to do so, and his election to proceed without such conductor or brakemen was a waiver on his part of any obligation of the company in that regard, and the plaintiff in such case would not be entitled to recover on that account.

It is a question of fact for you to determine, from all the evidence, whether the plaintiff knew that he would be required to perform the duties of a brakeman that day; so that,

under his first alleged ground of negligence, there are three questions for you to determine:¹

1. Was the train in question supplied with an inadequate force of employees?

2. If the force of employees with which the train was furnished was insufficient or inadequate, was it the proximate cause of the plaintiff's injury, or did it proximately contribute to the plaintiff's injury?

3. Did the plaintiff, by his conduct, assume the risk of injury resulting from this cause?²

¹ *R. R. Co. v. Knittal*, 33 O. S. 468; *R. R. Co. v. Fitzpatrick*, 31 O. S. 479; *Circleville v. Throne*, 1 C. C. 359.

² *Pugsley, Judge. Pennsylvania Co. v. Hinckley*. Affirmed by Circuit Court. Dismissed in Supreme Court, by plaintiff in error. *Lucas County. Mad River, etc., Co. v. Barber*, 5 O. S. 541.

No. 438. Master must exercise ordinary care in selecting servants.—The defendant is not bound to warrant the competency of its servant to discharge his duties, but only bound to exercise ordinary care in employing and retaining him. The duty of the company was to exercise ordinary care in the selection of its employees; or take that care which ordinarily prudent men are accustomed to exercise in their own affairs under similar circumstances. They are held to this degree of care, and this only.

If the jury find this defendant company did exercise ordinary care and caution at the time of employing B., the engineer, to ascertain whether he was competent or not, and did find him fully competent to discharge his duties as an engineer, then said company had the right to presume that he would continue competent until the contrary was known to them.

As to degree of care required in selecting servants, see *Mobile, etc., R. R. Co. v. Thomas*, 42 Ala. 459; *Cooley on Torts*, 659 (558); *Wood on Railroads*, Sec. 389.

No. 439. Master and servant—Assumption of risks by servant—Exceptions—Incompetence of—Fellow-servant.—It is a general rule of law that a servant, by entering into his master's service, assumes all the risks of that service which the master can not control, including the risk arising from the negligence of his fellow-servants. He assumes the risks of the negligence of the men employed with him in a common service—co-employees—engaged in a common employment, where the one is not in superior authority to the other.¹

¹ Danger not inherent in the work, and not in the manner of doing it, is not assumed. 47 O. S. 207. All risks not inherent in the work must be notified to him by the master. 23 W. L. B. 436; 27 W. L. B. 267. Only ordinary risks are assumed. 1 C. C. 359; 23 W. L. B. 436.

Now, one of the exceptions to the general rule is the exception upon which this case is urged upon the part of the plaintiff. That is to say, it is the claim of the plaintiff that the company was negligent because it employed a person who was incompetent to discharge the duty that was imposed upon him. And it is the claim of the plaintiff that his incompetency was unknown to J. P. And it is urged that because he was incompetent, and known by the company to be incompetent, therefore a right of action exists to the plaintiff, as the representative of J. P., to maintain an action for negligence against the company in its employing B. And undoubtedly this is one of the exceptions to the general rule which I have just stated. But this rule is subject to the qualification that a right may accrue where a person is injured through the negligence of a fellow-servant, if that fellow-servant was incompetent to discharge the duties imposed upon him, and the incompetency and the fact of this incompetency was known to the employer—to the railroad company.

For if it is true as a proposition of law that the company, acting in good faith and exercising ordinary care and diligence in the employment of B.; exercising that degree of care that ordinary prudent men are accustomed to employ under like circumstances, if these men employed this man to do this particular duty on this day in the belief that he was competent to do it, and in doing that exercised ordinary care in selecting him to do that, and it turned out upon this particular day, and the transactions that occurred there indicated incompetency, if they had no knowledge of his incompetency, the company would not be at fault, even though he proved to be incompetent. Of course after he had been in the employ of the company, in order to determine if it was apparent to the company that he was incompetent, by his methods of transacting the business imposed upon him; if this became apparent in the discharge of his duties, that he was incompetent, then it would follow that they had knowledge and would have to govern themselves accordingly.

If the jury find that engineer B. was a competent employee at the time he entered the service of this defendant company, but that he afterwards became incompetent, still, unless the railroad company had knowledge of such incompetency, it is not liable for injuries inflicted by said B.'s want of care to his fellow-servants.²

² From *The Cleveland Lorain & Wheeling R. R. Co. v. Pulley*. Supreme Court, unreported. Affirmed. Stone, Judge.

No. 440. Duties of master to servant—assumption of risks, etc.—The plaintiff's negligence is to be determined on settled rules of law. The defendant owed certain duties to the plaintiff, his employee. If he failed in the performance of those duties, then, as a matter of law, he would be negligent, and the question of the defendant's negligence depends whether it performed the duties imposed upon it by the law. When the plaintiff entered into the employ of the defendant he assumed all the ordinary risks and dangers of his employment, which would include the risks and dangers which may be occasioned by the carelessness or neglect of a fellow employee.¹ But the plaintiff did not, when he entered the services of the defendant, assume the risks and dangers occasioned by the carelessness or negligence of the defendant. Or, to restate the proposition, he did not assume the dangers or risks incident to the failure upon the part of the defendant to perform duties it owed to its employee. And if the plaintiff's injury in this case was the result of the ordinary risks and dangers of his occupation, then he could recover no damages for such injury, for the simple reason, gentlemen, that no person would then be in fault. If his injury was caused by the ordinary risks and hazards of his occupation, it would be a mere accident—the defendant not to blame and the plaintiff not to blame. But if the plaintiff's injury was occasioned by the negligence or carelessness of the defendant, then he may recover, unless his own carelessness or negligence in some way contributed to his injury.

Now, the defendant nailworks owed the duty to the plaintiff to exercise ordinary care by furnishing safe tools and implements for his use, and having a proper place in which to prosecute his work, and a reasonably safe means of access to and from his work. If the defendant failed in any of these particulars, and by reason of such failure plaintiff was injured, then plaintiff would be entitled to recover, unless you should find that plaintiff's negligence or carelessness contributed in some way to his own injury.²

¹ 1 C. C. 359; 23 W. L. B. 436; 33 O. S. 468; 2 C. C. 3.

² From *Bellaire Nail Works v. Morrison*. Supreme Court, unreported, No. 2902. Affirmed.

No. 341. Fellow-servants—Assumption of risks by—Exception to rule when incompetent servant employed.—(From ante, No. 439.) One of the exceptions to the general rule that the servant, when entering his master's employment, assumes the risks arising from the negligence of his fellow-servants (ante, No. 440) is where the employer has in his

service persons who are incompetent to discharge the duties imposed upon them.

That a right may accrue where a person is injured through the negligence of fellow-servant if that fellow-servant was incompetent to discharge the duties imposed upon him, and the incompetency, and the fact of this incompetency, was known to the employer—to the railroad company.

Was E. B. an incompetent person? Examine the testimony bearing upon that question. It is the contention of the railroad company that he had been in their employ for quite a period of time, and had had experience in operating whirlers that season and the preceding season; that he had been employed as fireman previously; that he had had instructions in the manner of operating these machines. I don't undertake now to state fully all that is claimed about his experience and knowledge of that business. You have heard the testimony of the witnesses who have testified as to their knowledge of him or have given their judgment of him as an engineer.

On the other hand, it is claimed by the plaintiff that E. B. was without any experience in running whirlers. That he had never been called to the discharge of that duty before. And they have called witnesses giving their judgment touching his qualifications. But it is their claim that he was placed there to discharge that duty—upon the day of this occurrence. The court expresses no opinion on this subject one way or the other; is not permitted to, and does not desire to. You are to determine, among other questions in the case, whether E. B. was an incompetent engineer, or a fit person to have charge of this machine. Next, you must find and pass upon the question, had the company knowledge that he was incompetent? Had the company knowledge of it?

It is charged, and there is, perhaps, no controversy upon this proposition, that E. B. was called to take charge of this machinery, this whirler, that day, by the direction of one superior in authority to him, who has been spoken of as the boss engineer, the boss of the docks.

Stone, Judge, in *C. L. & W. R. R. Co. v. Pulley*, S. C. No. 4131, *Cooley on Torts*, 659.

For discussion of the duty of company in the selection of competent employees, see *Wood on Railroads*, Secs. 389-390.

No. 442. Assumption of risks by brakeman.—After charging generally, as in ante, Nos. 439, 440, as to assumption of risks by a workman, as to a brakeman, proceed:

Applying that to this case, the plaintiff, C. S., in accepting the employment or service as a brakeman in the defendant's

railroad company, assumes the risk of injury from dangers ordinarily incident to the business, and the risk of danger from the negligence of his co-employees, but he does not assume the risk of danger to him from the negligence of those who occupy the relation of principal to him in his service and employment by the defendant.

Waight, Judge, in *C. A. & C. Ry. Co. v. Sharp*. Supreme Court, unreported. Affirming trial court.

No. 443. Insufficient force—Risk from assumed when.—

"It is the duty of a railway company to furnish the necessary and proper number of hands for the safe management of its trains, and for a delinquency in this particular the conductor of a train has a right to decline his charge, or refuse to run the train. But when he takes the charge and runs the train for a length of time, without a sufficient number of hands, he voluntarily assumes the risk and waives the obligation of the company in this respect as to himself, and if injured by means of such delinquency on the part of the company, he is without a remedy against the company for damages."

Railway Co. v. Barber, 5 O. S. 542.

In *Ry. v. Barber*, *supra*, the court say on page 560: "The company did not insure him (employee) against accident, or those unforeseen perils which due and proper care and diligence could not provide against. Injuries from accidents, which the utmost stretch of human skill and foresight can not provide against, are incident to all situations and conditions in life. And because one person is in the employ of another in a hazardous business it does not follow that the employer must stand responsible for damages resulting from injuries received through accidents which a proper degree of skill and diligence can not guard against."

And in *Ry. v. Knittel*, 33 O. S. 468, the court say: "The employee of a railroad company takes the ordinary hazards of the service, also such risks as arise from his own negligence or that of his fellow-servants."

No. 444. Fellow-servants—Who are—When one placed in control of another.—All who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades and departments of it, are fellow-servants. Where different persons are employed by the same principal in a common enterprise, and no control is given to one over the other, no action can be sustained by them against their employer on account of any injuries sustained by one agent through the negligence of another. But when one servant is placed by his employer in a position of subordination, and subject to the orders and control of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the

negligence of the superior servant, the master is liable for the injury.

Green, Judge, in *The C. A. & C. Ry. Co. v. Umstead*. Supreme Court, No. 2481; *Cooley on Torts*, 662 (560); *Jaggard on Torts*, 240.

No. 445. Negligence of co-employee—Rules for determining who is co-employee or vice-principal—Brakeman (plaintiff) and foreman.—But if you find that either of these persons were negligent in the discharge of their duty, then you will consider and determine whether the one you find was so negligent was a co-employee of the plaintiff, or occupied the position of vice-principal, so far as the defendant was concerned, in the plaintiff's employment by him. And the rule by which you are to determine whether he was a co-employee or vice-principal depends upon whether or not, under their employment by the defendant, the foreman actually had power or authority to direct and control the services of the plaintiff in his employment by the defendant. If he has this authority from their employer, then the former stands in the place of said employer as to the plaintiff, and if he is negligent, and his negligence results in injury to the plaintiff, the employer, the defendant in this case, would be liable. If he had no such authority, actual authority or power to direct and control these services of the plaintiff upon behalf of the defendant, but they stood equal in that regard, and they would be co-employees, and the defendant, the company, would not be liable for the negligence of either resulting in injury to the other.¹ Now, gentlemen of the jury, under these instructions, it is for you to determine, from the testimony in this case, whether or not this man J., the foreman of the brakemen, as he was designated in the proof, occupied this position of authority by reason of his employment by the defendant. If he did not, then the defendant would not be liable, even though he was negligent; if he did occupy this position of authority over the services of the plaintiff, then, if he was negligent in the performance of his duties, the defendant would be liable, unless the plaintiff was guilty of contributory negligence.²

¹ To constitute the relation of superior and inferior servant, the latter must be under the orders of the former. *Jenkins v. R. R. Co.*, 17 O. S. 197.

² *Waight, Judge, in C. A. & C. Ry. Co. v. Sharp*. Supreme Court, unreported. Judgment affirmed.

It has been uniformly held in Ohio, that where one servant is placed in a position of subordination to and subject to the orders and control of another servant of a common master, and the subordinate servant, without fault of his own and while in the performance of his duty, is injured through the negligence of the superior servant while acting in the common service, an action lies in favor of the inferior servant so injured

against the master. *L. M. R. R. Co. v. Stevens*, 20 O. 415; *C. C. & C. R. R. Co. v. De Keary*, 3 O. S. 208, 209 and 210; 17 O. S. 211; 36 O. S. 221, 224, 226; 38 O. S. 389.

"Whether an engineer, or employee of a railroad company, has authority to direct or control other employees of the same company, is a question of fact to be determined in each case. This may be done, however, either by proof of express authority, or by showing the exercise of such authority to be customary, or according to the usual course of conducting the business of the particular company interested, or of railroad companies generally." *Railroad Co. v. Margrat*, 31 W. L. B. 247; *Railway v. Lewis*, 33 O. S. 196.

No. 446. Respondeat superior—Disregard of orders of superior servant—Effect of.—Further, if you should find that, at the time of the accident, C. willfully disobeyed or disregarded the order or admonition of a servant superior to himself, that is, a servant under whose control he was, and to whose orders and directions he was made subject in the discharge of his duty, and such order pertained to his safety and such disobedience contributed at the time to his death, the plaintiff can not recover.

R. de Steiguer, Judge, in *Cook v. C. H. V. & T. Ry.*, 51 O. S. 636.

No. 447. Fellow-servants—Conductor and brakeman.—If C. was actually subject to the control and direction of B., as conductor, in the discharge of his duties as brakeman, then he was not the fellow-servant of the conductor, but the conductor was the superior servant of C., and the acts of the conductor's and his orders and directions, in the discharge of his duties as such, would be acts of the defendant.

R. de Steiguer, Judge, in *Cook v. C. H. V. v. T. Ry.*, 51 O. S. 636.

No. 448. Fellow-servants — Operator and train dispatcher.—The negligence of the operator, H., I have already said to you, standing alone would not entitle the plaintiff to a recovery, for the reason that it would be in law the negligence of a fellow-servant. But if you find that this negligence on the part of H. was induced, caused, and brought about by the negligence on the part of the train dispatcher, and was the natural, immediate, and necessary consequence of negligence on the part of the train dispatcher, then the fact, if you find it to be a fact, that the operator was negligent in the discharge of his duty for this reason, it would not prevent a recovery in this case, if you find the train dispatcher to have been negligent, and that the negligence of the train dispatcher was the proximate cause of the injury. But if you find that the negligence of the train dispatcher was the proximate cause of the injury, and *that* operating with negligence of H., the operator, the two together caused the injury, the negli-

gence of H. contributed simply to produce the effect which was the direct result, however, of the original negligence of the train dispatcher, this negligence on the part of H. thus operating in connection with the negligence of the train dispatcher, or, if it was actually induced, brought about, and caused by his negligence, would not prevent a recovery, if upon the other matters you find in favor of the plaintiff. And in considering this question as to whose negligent act, if any, was the proximate cause of the injury, you should also bear in mind that the law presumes that each of these parties would do their duty, and the train dispatcher would have the right to presume that H., the operator, would discharge his duty when he sent orders to him.

From *P. & W. Ry. Co. v. Flenner*, S. C. 4074, Mahoning County. Judgments affirmed. J. R. Johnston, Judge.

No. 449. Fellow-servants—Train dispatcher and conductor.—It is agreed that the plaintiff, the train dispatcher A., and the conductor M. were employees of the defendant, engaged in the common enterprise of conducting the business of the defendant.

The plaintiff claiming that, by the terms of his employment and the rules adopted by the defendant, and which rules he was bound to obey, he was placed under the control of and bound to obey the orders of the train dispatcher A. and the conductor M.

And that, while he was in the discharge of his duties, obeying the orders of his superiors, A. and M., by the negligence and carelessness of his superiors, and without any fault on his part, he received the injury complained of.

The defendant claiming that the plaintiff, the train dispatcher A., and the conductor M. were fellow-servants, and that no control was given to one over the other so as to put the plaintiff in a position of subordination to and under the control of said train dispatcher A., or said conductor M.

You must determine from the evidence what are the facts proven. If you find from the evidence that the claim of the defendant is true—that plaintiff was not under the control of his fellow-servants A., the train dispatcher, or M., the conductor, then, although he was injured and injured by the negligence or carelessness of said train dispatcher or conductor, the defendant would not be liable, and your verdict should be for the defendant.

If you find from the evidence that the claim of the plaintiff is true—that is, that he was, by the terms of his employment and the rules of the defendant, and which rules the

plaintiff was bound to obey, placed under the control of, and bound to obey the orders of, the train dispatcher and the conductor, and that while he was in the discharge of his duty in obedience to the orders of said train dispatcher or said conductor, and without any fault of his, by reason of the negligence and carelessness of said train dispatcher or said conductor he was injured, and but for such negligence he would not have received the injury, then your verdict should be for the plaintiff. If, under the rules that I have given you, you find from the facts that the plaintiff is entitled to recover, you will then determine what amount he is entitled to receive.

From *The C. A. & C. Ry. Co. v. Umstead*, Supreme Court, affirmed, No. 2481. Green, Judge.

No. 450. Fellow-servants—Relation between engineer and train dispatcher.—The defendant from the statement of its claim says that if there was any negligence, it was the negligence of a fellow-servant, and for this it would not be liable, and this brings you to the consideration of the question as to whether or not the assistant train dispatcher or the operator at P. were the fellow-servants of the engineer R.

Upon this question you are instructed that if you find that the defendant had at that time committed and entrusted the entire charge of its business with regard to the making and transmitting the order for the moving of train — to the assistant train dispatcher, or to him and the telegraph operator jointly, and exercised no discretion or oversight over them, or either of them, in regard thereto, then the act or acts of the one or both, as you may find this business to have been thus entrusted to the one or both, would be the act or acts of the defendant, and if the one or the other, or both, to whom you may have found this particular business to have been entrusted by the defendant, did not act with ordinary care in the making and transmitting of the order to the conductor and engineer of train —, and the injury to R. resulted directly therefrom, and R. himself was in exercise of ordinary care, then for such negligence the defendant would be liable. But if you find that the defendant did not so entrust its business, and this particular business, to the assistant train dispatcher, or the telegraph operator, or to either or both of them, then, as to the one or both as you may find to whom the defendant had not thus entrusted this particular business, the relation of fellow-servant would exist between such one or both and the engineer R., unless you find that they, or either of them, had authority from the defendant to control his movements in

regard to this train, and had the right to order him in regard to its movements, and did so order him, and the train was moved, and for the want of care of such a fellow-servant to whom this business was not so entrusted, and who had not the authority to order, and did not so order, the conductor and engineer, the defendant would not be liable.

Johnston, Judge, in *Rogers v. P. L. E. R. R. Co.*

No. 451. Fellow-servants — Superior servants — Engineer and fireman.—Whether or not the engineer gave this order is a disputed question of fact in this case which you must decide. If he did not give the order, if the coupling was not made by the fireman under the orders or direction of the engineer, or if the circumstances were such that the fireman had no good reason to believe that he was directed or commanded by the engineer to make this coupling, that, of course, will end your inquiry so far as this branch of the case is concerned.

But if you find from the evidence that the engineer did give this order to the fireman to make this coupling, then the questions involved are: Whether the giving of this order was, under all the circumstances of the case, a negligent or wrongful act on the part of the engineer, for which the company is responsible; and whether the plaintiff was himself negligent in obeying the order.

Where a servant of a railroad company, without fault on his part, is injured through the negligence of a fellow-servant, and the injured servant is not placed by the company under the control or direction of the negligent servant, then the company is not responsible for the injury. In such case the two servants are regarded as fellow-servants, without any relation of superiority or subordination between them, and in such a case the company is not liable.

The servant who enters into the service of a company takes upon himself all the ordinary risks incident to the service, and among these ordinary risks is the risk of injury from a fellow-servant who has no control or supervision over him. But if the injured servant is placed by the company under the control and direction of the negligent servant, then the neglect of the latter—the superior servant—is regarded as the neglect of the company, and this is upon the ground that the superior servant, as to the matter in hand, is the representative of the company, and the negligence of the superior servant, under such circumstances, is treated as the negligence of the company.

It appears from the evidence in this case that the plaintiff

was employed by the company in the capacity of a fireman, and that he was performing services in that capacity on the day of the injury. It appears that at the time of his injury he was endeavoring to couple these two freight-cars—a service usually performed by a brakeman or switchman. So it appears he was at the time performing an act, or attempting to perform an act, outside of the usual line of his employment. If you find from the evidence that he attempted to make the coupling in consequence of the order or direction of the engineer, you will inquire whether such order or direction was, under all the circumstances, a negligent or wrongful act on his part. You will consider all the circumstances: what the engineer knew, if anything, relating to the capacity of the fireman to perform that kind of service, and consider all the circumstances.

To hold the company it must appear that the engineer was guilty of negligence in giving the order, if he gave the order, and that, by the act of the company, the engineer had the management and control of the train upon that day, and that the plaintiff, as one of the employees, was under the direction and control of the engineer in the operation and management of the train that day; in other words, it must appear that the engineer was the superior servant of the plaintiff in order to hold the company responsible for the negligence of the engineer. This is a question of fact which must be determined from all the evidence in the case, viz.: whether the plaintiff was the subordinate of the engineer in respect to the work in which the plaintiff was engaged at the time of the injury. If he was not such subordinate, if he was under the control or direction of someone else, if he was not the subordinate of the engineer, then the company is not liable for the negligence of the engineer. But if upon that day the engineer had the control of the train and the control of the employees, including the plaintiff, in the operation of the train, then upon that day the engineer represented the company, and his negligence would be regarded as the negligence of the company.

Under this second ground of negligence it remains to be considered: whether the plaintiff was himself, in obeying the order of the engineer (in case you find such order was given), negligent?

A servant's primary duty to his superior is obedience; but if the act which he is ordered to perform is so obviously dangerous that a man of common prudence would not undertake it, then it is his duty to refuse to perform it. The order of the superior is presumed to be lawful and proper, and a servant is protected in obeying it, if he believes, and if he

has good reason to believe that, by the exercise of caution, he can perform the act with safety.

Now it is for you to say, from all the evidence and all the circumstances of the case, whether the plaintiff ought or ought not to have obeyed the order of the engineer to couple these cars, if such order was given. The plaintiff, as I have said, assumed and took upon himself all ordinary risks and perils incident to the service in which he became engaged. If he is ordered to perform a service outside of the line of his employment, and he is aware of the peculiar peril of such service—if he knows, understands, and appreciates the risks incident to such service—then, in undertaking to discharge the service, he takes upon himself the risks of injury. But the master has no right to subject him to unusual or extraordinary perils with which the servant is not familiar, or is unacquainted, without cautioning him. In other words, the inquiry is, here, whether, under all the circumstances of the case—his knowledge of the situation—he acted as an ordinarily prudent person would act under the same circumstances.

The care which he was required to take for his own safety, to avoid injury to himself, was such care as ordinarily prudent persons usually exercise under the same circumstances.

From *Pennsylvania Co. v. Hinckley*, Supreme Court, Lucas County. Pugsley, Judge. An engineer with power to control or direct his fireman is a superior. *Railroad v. Margrat*, 51 O. S. 130.

No. 452. Fellow-servants—Injury to brakeman caused by engineer quickening speed too suddenly.—"That if the jury should find that the engineer on the train upon which the plaintiff was working at the time of the injury was negligent in quickening the speed of the train too suddenly, the defendant is not liable in this action to the plaintiff for such negligence."

Waight, Judge, given by request, in *C. A. & C. Ry. v. Sharp*.

No. 453. Fellow-servants—Injury to brakeman coupling cars because of loose rails lying alongside of track.—If the decedent, in uncoupling the cars at the time the injury complained of was received, was in performance of a duty imposed upon him by and under the orders of a superior officer at the time, and if, in so doing, he was guilty of no negligence, and without negligence in the performance of such labor on his part, he was injured because of loose rails lying alongside said track, by being tripped and caught by them and drawn under the cars as alleged, of the presence of

which loose rails you shall say from the evidence that he was at the time in ignorance; and you shall say that the leaving of such loose rails at that place was negligence or want of ordinary care on the part of the defendant, under the rules heretofore given you, then plaintiff would be entitled to recover.

Wm. H. Handy, Judge, in *Ludwig v. C., H. & D. R. R. Co.*, Supreme Court. Charge approved.

No. 454. Acts done by servant at request of a fellow-servant—Liability of master.—The court instructs the jury if they find from the evidence that the said M. was working at one place in said mine, and was requested by a fellow-servant to go to another place in said mine to assist said fellow-servant in putting up said post, and while so assisting said fellow servant, received the injury of which he complains, then the plaintiff can not recover, for a servant can not recover for an injury incurred in assisting a fellow-servant, either voluntarily or on the request of such servant.

From *Morris Coal Co. v. Mitchell*, Supreme Court. Affirmed. *Huffman*, Judge, given by request. *Osborn v. Knox. R. R.*, 28 Am. Rep. 16.

No. 455. Obviously dangerous acts done by order of superior servant.—If the jury should find from the evidence that the said J. M. was ordered by his superior servant to do an act that is *obviously* dangerous, and which, when done, was the cause resulting in the injuries of which he complains, this would not render the defendant liable, for the liability of the defendant is conditioned upon the exercise of reasonable and proper care. In order for the plaintiff to recover for the negligence of the defendant by its servants, M. must have been free from negligence contributing to the injury of which he complains.

If the jury find from the evidence that, at the time said M. attempted to assist to pull up the post that had been knocked down, it was obviously rash and dangerous for a man exercising ordinary care and prudence to do so, and the danger was plain and apparent to plaintiff; plaintiff was not obliged to obey an order to do a rash and dangerous thing, and if he did so, under those circumstances, although ordered so to do by a superior servant, and in so doing contributed to the injury of which he complains, the plaintiff can not recover.

From *Morris Coal Co. v. Mitchell*, Supreme Court. Affirmed. *Huffman*, Judge, given by request.

No. 456. Master not an insurer—Duty to furnish safe machinery—Assumption of risks—A concise charge covering these points.—I say to you as a matter of law that, in the absence of a contract, the master is not in any sense the insurer of the safety of his servant. It is the employer's duty to furnish the servant with reasonably safe appliances, and to protect him from such dangers in the performance of his work as, in the exercise of ordinary care and prudence, can be provided against. The servant, by the terms of his employment, is presumed to assume the risk of such injuries from accident as are incident to the nature and character of the employment, and against which the master could not, in the exercise of ordinary care, have protected him.

No. 457. Warning of danger by fellow-servant.—If the jury find from the evidence that the plaintiff was warned by his fellow workman not to attempt to perform the service by which he was injured, and that plaintiff, by the exercise of ordinary care and prudence after receiving such warning, had time to escape from such danger and avoid receiving the injuries of which he complains, and plaintiff disregarded such warning and was injured, he can not recover, for I charge you if you find such to be the fact, that plaintiff would be guilty of contributory negligence by his own fault to the injuries for which he seeks to recover damages from the defendant.

From *Morris Coal Co. v. Mitchell*, Supreme Court. Affirmed.

No. 458. Knowledge of danger by master and by servant.—I say to you further that no recovery can be had against the master where the cause of the injury, of whatever nature, was unknown to the master, and could not have been known in the exercise of ordinary care. And, furthermore, no recovery can be had where the source of danger is known to the servant, and he, without communicating his knowledge to the master, continues in his service. In such case he is presumed voluntarily to assume the risk, and he can not recover unless it is made to appear that he informed the master of the facts, and continued in his service on the faith of a promise that he would remove the danger by remedying the defects.

David J. Nye, Judge, in *C. L. & W. R. R. v. Nehl*, Supreme Court, 4187. Judgment affirmed.

No. 459. Knowledge of dangerous methods amounts to acquiescence and assumption of risks.—If it be conceded that the switching of cars from the main track to a side track

while the train is in motion is a dangerous mode of doing business and ought to be regarded as evidence of negligence, still all employees who entered the service of the company with full knowledge that such was the practice, or acquired such knowledge afterwards, and remained in the service without the least objection thereto, and fully acquiesced therein, must be regarded as having consented to the practice or as having waived any objection thereto, and therefore as having taken the risk upon themselves."

Railroad Company v. Knittal, 33 O. S. 468.

No. 460. Knowledge of work and assumption of risks.—If the jury find from the evidence that the said J. M. entered the employment of the defendant to perform the work of a miner, and he had "knowledge of the kind of work he was to perform, then he assumed the ordinary risks and dangers of the service, and he accepted the service subject to such risks thereto."

From Morris Coal Co. v. Mitchell, Supreme Court. Affirmed. Huffman, Judge, given by request.

Judgments of Common Pleas affirmed and charge approved. 27 W. L. B. 347. Knowledge of danger is not negligence *per se*. 4 Am. & Eng. Enc. of Law, p. 35, n. 2. City of Circleville v. Thorne, 1 O. C. C. Rep., p. 359.

No. 461. Same continued—Knowledge of incompetency of servant by master.—The company, an incorporated company, acts through its agents, its officers, as is apparent to everyone upon a moment's reflection; and when its engineer directs a thing to be done, as the directing of B. to take charge of an engine, that is the act of the company, and the knowledge of the boss engineer on the subject of a man's competency or incompetency may be said to be the knowledge of the company upon that subject. The claim is that these officers in control had knowledge of B.'s incompetency; and so I say in general terms that the knowledge of the company is the knowledge of those who were put in charge of it to control or direct its affairs.

Now, at the time of E. B.'s employment there had the company knowledge through its agents and officers of his incompetency? This I have already indicated that it is essential to the plaintiff's case, in order to maintain it, to show not alone that he was incompetent, but that the company through its agents had knowledge of it; so examine that question.

For if it is true as a proposition of law that the company, acting in good faith and exercising ordinary care and diligence in the employment of B.; exercising that degree of care

that ordinary prudent men are accustomed to employ under like circumstances; if these men employed this man to do this particular duty on this day, in the belief that he was competent to do it, and in doing that exercised ordinary care in selecting him to do that, and it turned out upon this particular day, and the transactions that occurred there indicated incompetency, if they had no knowledge of his incompetency the company would not be at fault even though he proved to be incompetent. Of course, after he had been in the employ of the company, in order to determine if it was apparent to the company that he was incompetent by his methods of transacting the business imposed upon him; if this became apparent in the discharge of his duties, that he was incompetent, then it would follow that they had knowledge and would have to govern themselves accordingly.

So ascertain what the fact is, and as to whether the company had knowledge of his incompetency, for this fact must appear to render the company liable for the acts of which complaint is made.

Stone, Judge, in *L. E. & W. R. R. Co. v. Pulley*, Supreme Court, 4131. Affirmed.

No. 462. Continuance to use dangerous agencies after knowledge.—The defendant was not required to exercise the highest degree of care, to furnish the safest machinery and tools, or to furnish the safest known place to prosecute his work, or the safest means of access to and from his work, but it was bound to exercise ordinary care in furnishing such tools and implements and furnish such place for the prosecution of his work.

Now, the question for you to determine in this case, gentlemen, is whether in leaving that pit in that condition that it was at the time, if you find from the evidence that the crossing was dangerous, and that the plaintiff knew of such danger and continued to use the same, and was injured by using it for crossing, such facts standing alone would warrant you in finding that the plaintiff was guilty of negligence, or contributed to his own injury and he couldn't recover. I mean to say to you, gentlemen, that that fact standing alone would itself constitute contributory negligence upon the part of the plaintiff, and he could not recover in this action, but if you shall find that he had knowledge of the danger incident to its crossing, and that he complained of its condition to the superintendent of the mill under whose orders he was working, and that the superintendent promised to place the crossing in a safe condition and directed him to continue to use it.

and he was injured thereby, then the fact of his knowledge of the dangerous condition of the way would not in itself be conclusive evidence of contributory negligence on the part of the plaintiff, but such, however, may be taken into consideration by you in determining the question of contributory negligence on the part of plaintiff.

From *Bellaire Nail Works v. Morrison*, Supreme Court, unreported, No. 2902. Affirmed.

No. 463. Contributory negligence considered with reference to directions of master.—But it should be remembered that where the injured party acts in obedience to the direction of his master, or his superintendent, who has authority to control the conduct of the employee, and he is thereby injured in so doing, his obedience to said directions will not be deemed such contributory negligence as would defeat an action, unless the danger was so obvious as to make his obedience under the circumstances unreasonable, having reference to his personal safety and the authority of the master. If the defendants, or their superintendent, which is the same thing, induced the plaintiff (or decedent) to act in the manner he did, and the injury resulted thereby, and the plaintiff's (or decedent's) obedience in that respect was not unreasonable under the circumstances, they can not successfully set up such acts as a defense.

Under such circumstances you are instructed that the contributory negligence can not be imputed to the plaintiff (or decedent) if he acted in good faith and reasonably under the circumstances and pursuant to the express instruction of his master, or of his duly authorized superintendent. It appears to the court to be grossly inconsistent for the defendants to direct the decedent to do certain acts or to perform certain services in the line of his duty to them, and then be permitted to assert that the obedience to such orders was negligence on his part that would defeat an action to recover damages resulting from injuries caused thereby, if the plaintiff (or decedent) acted reasonably under the circumstances.

Voris, Judge, in *Quinn v. Ewart*, Summit County Common Pleas.

No. 464. Fellow-servants—Injury to hatchtender while unloading cargo of ore from a schooner by means of steam whirler—Assumption of risks by.—It is a general rule of law that a servant, by entering into his master's service, assumes all the risks of that service which the master can not control, including the risk arising from the negligence of his fellow-servants.

Putting this principle into language that will more properly fit the case, the rule may be stated thus: When J. P., as an employee of the railroad company, entered into its service as such, he assumed all the risks of that service which the railroad company could not control, including this risk from the negligence of his fellow employee, E. B., as well as other co-employees or servants in the common employment of the company. That is to say, in general terms, when one engages in labor of this sort, he takes certain risks. He takes the risks of the negligence of the men employed with him in a common service—co-employees they are called oftentimes—engaged in a common employment, where the one is not superior in authority to the other. And so as a legal proposition E. B. and J. P. were common employees—co-employees—engaged in a common service, having different duties to perform, it is true, but were engaged in a common service, a common employment, namely in their appropriate places aiding in discharging this vessel of a cargo of ore upon the railroad tracks brought adjacent and contiguous for that purpose, so that they did not occupy the relation of superior and inferior in their employment, but were co-employees in a common service. It would therefore follow that if J. P. was injured through the negligence or carelessness of his co-employee, E. B., who was at the time in charge of operating the whirler, there could be no recovery in this case, if that was all there was of it; if he is simply injured by the negligence of E. B., if he was negligent, unless certain other things are made to appear.

From *C. L. & W. R. R. Co. v. Pulley*, Supreme Court, unreported, 4131. Stone, Judge. Affirmed.

No. 465. Duty of railroad conductor.—It is the duty of the conductor to use ordinary care in the discharge of the duties of his employment. If he has charge and control of this train of the defendant, and has power to direct and control the services of the plaintiff on behalf of the defendant, then his duty would be to exercise ordinary care in the discharge of these duties; and ordinary care means the care that a person of ordinary prudence would use under the same or similar circumstances. It is for you to say, from the testimony in the case, whether or not the conductor exercised this ordinary care in the discharge of the duties of his employment. If he did, that is the extent that the law requires of him, and the defendant would not be liable. If he did not, and his failure to exercise this ordinary care resulted in injury to the plaintiff, and he occupied such a position as the court will

hereafter define in the employ of the defendant, as would make the defendant liable to the plaintiff for his negligence, then they would be liable. This is for you to determine from the testimony. If you find that he exercised this ordinary care, then your verdict should be for the defendant, so far as this charge of negligence is concerned in the defendant. If he failed to exercise this ordinary care, and it produced the injury to the plaintiff, then your verdict should be for the plaintiff, unless you find for the defendant on other grounds.

Waight, Judge, in *C. A. & C. Ry. Co. v. Sharp*, Supreme Court, unreported. Judgments affirmed. No. 4012.

No. 466.—Deemed to have knowledge of defect—Burden of proof on company to rebut.—Under a statute in force in this state at the time of this accident, and applicable thereto, it is provided:

“If the employees of any railroad corporation shall receive any injury by reason of any defect in any car or locomotive, or the machinery or attachment thereto belonging, owned and operated, or being run and operated by such corporation, such corporation shall be deemed to have had knowledge of such defect before and at the time such injury is so sustained, and when the fact of such defect shall be made to appear in the trial of any action in the courts of this state, brought by such employee, or his legal representative, against any railroad company for damages on account of such injuries so received, the same shall be *prima facie* evidence of negligence on the part of such corporation.”

So that if it shall have appeared to you that Mr. J.'s death occurred as a proximate result of a defect which existed in this brake-rod, which caused it to break, and produced the injuries causing such death at a time when he was acting as the employee of defendant company, then the company is deemed to have had knowledge of such defect at and before the time of such injury, and the fact of such defect is *prima facie* evidence of negligence on the part of defendant company, which simply means that, in the absence of any other evidence in the case bearing upon the knowledge of defendant company, it would justify and require the jury to presume that in the respect pointed out defendant was negligent. This presumption which arises under the circumstances named, however, is no more than a presumption which may be met and overcome by other proofs advanced. If such presumption arises, then upon the question as to whether defendant company actually knew, or by the exercise of ordinary care could or ought to have known such defect, or to put it

the other way, whether or not defendant company was negligent, the burden of proof is upon defendant company to overcome such presumption or inference of negligence, not that the company would be required to satisfy you that it was not negligent, but to show, having fairly weighed all the proofs, that it probably was not negligent.

No. 467. Duty of company as to inspection.—What was the duty of defendant company in the premises? The company owed the duty to its employees to exercise vigilance in using ordinary care to maintain, and in maintaining, the car and its appliances, and keeping the same in reasonable repair, and in the performance of this duty it must exercise ordinary care in adopting means of inspection, with a view of determining its condition, and must supply itself with facilities for making repairs from time to time when needed. If the jury find that the railway company had in its employ an adequate force of careful and competent car inspectors, at various places along its line, through which this car in the course of traffic passed, and whose duty it was, and who did, upon the arrival or departure of said car, inspect the same by a careful examination and attention to it, with a view of determining any visible or apparent defect in said car or its equipments, and if you find that sufficient instructions were given to said inspectors as to what to do in their work, and that such instructions and method of work were enforced by the company, and if you find that shortly before this accident the car was inspected in this manner by a careful and competent inspector in the employ of the — R. R. Co., and this defect in the brake-staff was not discovered by said inspectors, or reported to the company, and that said company had no knowledge, through any of its agents or officers, of the crack or flaw in the brake, that then the defendant has performed its duty to decedent in that regard.

Now, this has a meaning that may not be clearly apparent to you in some respects. It was not sufficient that the company should supply a sufficient number of competent inspectors. The company's duty went further and required of it when it supplied the inspectors to also use reasonable care in furnishing them reasonably sufficient instructions as to the due performance of their duties. It would not be a sufficient compliance with its legal duty for the railway company to provide sufficient competent inspectors and leave them to the performance of their duties without reasonable instructions as to their duties to enable them to reasonably accomplish the object intended, to wit: The exercise of ordinary care to

ascertain the condition of the machinery. True, if the inspectors actually performed the duty of ordinary care required of the company as to inspections, it would not matter that the company had failed to furnish proper instructions.

You will bear in mind that for the mere negligence of duty on the part of the inspectors the defendant company would not be liable because such inspectors are fellow-servants with J.; that is, if you find it was the duty of the car inspector, in the event that there was anything in the appearance or condition of the visible portions of the brake-staff to raise a doubt as to the soundness of the hidden portions, to examine said hidden portion for possible defects, and if you find that there was, at the time of the last inspection of said car, anything in the condition of the visible portions of said shaft or rod which would raise a doubt in the mind of a competent inspector as to the soundness of the hidden portion thereof, and the inspector failed or neglected to examine the same, and by reason of his failure so to do the car was passed into J.'s hand, and so caused his death, for the negligence of said inspector there can be no recovery against defendant.

Still, if the inspector's mode of examination was a negligent one, but it was made in the manner directed by the company, or with the full knowledge of the company how it was made, and that manner was negligently defective, the defendant would be liable for such negligence.

I have already given you the rule of duty which the law devolved upon defendant company, and the question of its due performance by the company is purely one for the jury.

In its rules established as to inspections, and the means provided for duly carrying them out, to the effect of reasonably accomplishing the legal end of a due performance of its duty, the company was bound to be vigilant in taking all reasonable precautions; that is, it was bound to exercise that degree and kind of care which ordinarily prudent persons are ordinarily accustomed to exercise under the same or similar circumstances, which you have the right to know and consider how such matters are regulated and carried on by other railways; the rule given you does not mean that if other railways engaged in similar business are accustomed to perform their duties in this respect in a negligent manner, that such fact would justify this defendant in a similar negligence.

The objective result of this rule desired to be reached is that, in the operation of the road and the performance of the duty by the employee, he shall be as reasonably safe personally as vigilance in the exercise of ordinary care for his safety on the part of the company ordinarily can render him.

Nor is the mere exigency of their traffic any excuse relieving a company from the due exercise of ordinary care in maintaining their machinery in a reasonably safe condition. But whether or not such due care is exercised must be determined, having in mind, together with the other evidence bearing thereon, the uses made of such machinery in the company's traffic, and giving due consideration to the exigencies thereof, and the natural manner in which such ordinary care could be reasonably exercised, considering the surrounding situation and the reasonable performance by the company of its duties to the public as a common carrier, and its other operations in carrying on its railway and business.

George F. Robinson, Judge, in *The P. & L. E. R. R. Co. v. Johnston's Admr.*, S. C. 4351. Affirmed by C. C. and Supreme Courts.

No. 468. Collision resulting from negligence of train dispatcher.—The plaintiff must produce a preponderance of the proof that the defendant was negligent, which proximately caused the injury. The question of proximate cause is one of fact submitted to you to be determined by you in view of all the facts and circumstances surrounding the parties at the time. The term proximate cause is used in contradistinction to the term remote cause. For a remote cause the defendant would not be liable, even though negligent. It must be the proximate cause of the injury, and that proximate cause would be the one directly producing the injury. The injury must be the natural and probable consequence of the negligence. Such a consequence as, under all the circumstances of the case, might and ought to have been foreseen by the defendant as likely to follow from its act. And in this case if, from your investigation, you should find that the train dispatcher in sending orders acted negligently, then the question arises for you to determine: Was this negligence on the part of the train dispatcher the proximate cause of the injury? In determining that, you should ascertain whether or not the injury of which the plaintiff complains was the natural and probable consequence of the negligence of the train dispatcher, if you find he was negligent, and whether or not, under all the circumstances, the train dispatcher might and ought to have foreseen the consequences which followed his negligent act.

The negligence of the operator standing alone would not entitle the plaintiff to a recovery, for the reason that it would be in law the negligence of a fellow-servant. But if you find that this negligence on the part of the operator was induced and caused and brought about by the negligence of the train

dispatcher, and was the natural, immediate, and necessary consequence of negligence on the part of the train dispatcher, then the fact that the operator was negligent in the discharge of his duty for this reason, would not prevent a recovery, if you find the train dispatcher to have been negligent, and that his negligence was the proximate cause of the injury. But if you find that the negligence of the train dispatcher was the proximate cause of the injury, and *that* operating with the negligence of the operator, the two together caused the injury, the negligence of the operator contributing merely to produce the effect which was the direct result of the original negligence on the part of the train dispatcher, this negligence on the part of the operator thus operating in connection with the negligence of the train dispatcher, or if it was actually induced and brought about by his negligence, would not prevent a recovery, if, upon the other matters, you find in favor of the plaintiff.

Johnston, Judge, in *Flenner v. P. & W. R. R. Co.*

No. 469. Injury to person under railroad car making repairs.—The defendant claims that it was a rule of railroad companies known to the plaintiff, when a person was repairing a car, to put out and place upon each end of the car blue flags to advise and warn railroadmen working in and about said yard that some person was at work under or about the car making repairs thereon. It is then a question of fact for you to determine, in the light of all the evidence which has been given you, whether the defendant company was negligent and careless in the running of the cars which it, by its servants and employees, was attempting to move, or whether the defendant, by its agents and servants, in moving the cars used such care and prudence as men of ordinary care and prudence are accustomed to use under the same or similar circumstances. "The solution of this question depends upon the peculiar facts and circumstances of this case, the state and condition of the parties, and the manner in which, and the circumstances under which, the injury was received or inflicted. In short, all the circumstances surrounding the transaction which in any way reflect either upon the degree of care or the manner in which, in this particular case, it should have been exercised." You will consider the testimony relating to the conduct of the man in charge, and who managed and controlled the cars of the defendant. Did they, in view of all the circumstances of this case, exercise due and ordinary care in running and managing the cars, or did they omit to exercise it? When the engineer and brakeman of the

defendant company, running the cars back over the track, did they exercise such care and caution in doing it as men of ordinary prudence and caution would exercise under like or similar circumstances? If they did, then the defendant was not guilty of negligence in so doing; if they did not, then the defendant was guilty of negligence. . . .

As matter of law the conductor of the railroad train would have no right to suspend the operation of a rule by dispensing with the placing of flags upon the car being repaired by the plaintiff. If you find from the evidence that the rules of said railroad companies require a blue flag to be placed upon each end of the car which was being repaired, and that the plaintiff neglected to place such flag upon the car upon which he was at work at the time of his injury, and that by reason of his failure and neglect to place said blue flags upon said car his injuries were caused, he can not recover in this case. In other words, if you find that the rules of the railroad companies required the placing of a blue flag upon the ends of the car being repaired, and that the plaintiff had knowledge of such rules and failed and neglected to place the flags upon the car, and you further find that if he had placed the flags upon the ends of the car, the brakeman upon said cars which were moving back toward him would have seen the flag and have prevented the injury to the plaintiff, then the plaintiff could not recover.

If you find that the plaintiff was negligent in not placing flags upon the end of the car which he was repairing, and that such negligence contributed to his own injury, he can not recover in this action.

Nye, Judge, in *Johnson v. C. L. & W. Ry. Co.*, Lorain County Common Pleas.

(6) Railroads—Duty to Block Frogs.

No. 470. Failure of railroad company to block a frog is negligence.—As bearing on these questions, it is admitted in the pleadings, and not controverted in the trial, that the frog of the switch at which the injury occurred was not blocked. It is my duty to charge you, as a matter of law, that the failure on the part of a railroad company to block a frog is, in itself, negligence, and such failure being admitted in the case by the defendant, you will be authorized to determine at once the first of the questions to which I have just referred in the affirmative, and decide that the defendant was guilty

of negligence, and other facts appearing and existing, the plaintiff would be entitled to recover.

W. T. Mooney, Judge, in *C. & E. R. R. Co. v. Purviance*. R. S., Secs. 8516-31, requires railroads to adjust, fill or block the frogs, switches, etc., so as to prevent the feet of its employees from being caught therein. Neglect to comply with statutory duty is negligence *per se*. Wood on Railways, Sec. 397.

No. 471. Omission to adjust, fill or block switch.—Your attention is called to the statute on that subject. It has been enacted by the legislature of Ohio, and such was the law at the time this injury occurred, that "Every railroad corporation operating a railroad or part of a railroad in this state shall, before the first day of October in the year 1888, adjust, fill, or block the frogs, switches, and guard-rails on its tracks, with the exception of guard-rails on bridges, so as to prevent the feet of its employees from being caught therein, and the work shall be done to the satisfaction of the railroad commissioner."¹

Now then, taking into account the law, that goes to the jury as a part of the evidence, for them to consider whether or not it was negligence on the part of the defendant in leaving any frog, switch, or guard-rail unblocked; and you may consider, or first I should say to you, perhaps, that it is for the jury to judge of the credibility of the witnesses, the credibility of the testimony, the confidence that they should place in the statements of the witnesses.

Now, going back to this matter of the obligation of the company to block these switches, frogs, and guard-rails, it is alleged by the plaintiff that the defendant carelessly omitted to adjust, fill, or block this switch where the plaintiff caught his foot. A great deal of evidence was submitted to you as to the practicability of doing that. And you are to take that into account and say whether it is practicable, whether it would obviate the danger or diminish the danger of being caught there at that place where the plaintiff claims he was caught, or where his foot was caught. Consider whether it would interfere with the operation of the road, and the operation of the cars over these tracks, seriously; and determine that question, whether it is practicable, on the whole, to block that place, whether the omission to block it was negligence on the part of the company, taking into account all the evidence on that subject, taking the opinions of the witnesses as to how the tracks are to be used there, their statements on that subject, what would be the openings there with a block

¹ R. S., Secs. 8516-31.

in there, when the switch was turned, and whether that aperture or opening between the rail and the block when the switch is open, whether that would leave the same danger that would exist without the blocking, whether, with that block there, it would prevent the split of the rail from being close to the stationary or bent rail, as they call it, so as to produce the danger of derailing the cars that go across there. Take all those matters into account, and say whether, fairly and reasonably, there ought to have been a block there; and then say whether you find it established by a preponderance of the evidence that the defendant was negligent in not blocking it there. And if you find that that is made out by the evidence, why, then you may take that as established, and that will be one step towards a verdict for the plaintiff. If that is not made out, if you find that it is not practicable, if you find that the defendant was not negligent in failing to block that place there, why, then that is the end of your inquiry, and your verdict must be for the defendant, because that is the negligence charged in the petition. But if you find that is established, as I have said, then go further and ascertain whether it is made out that the plaintiff was caught in that way.

I should say to you that the law on this subject, requiring these frogs, switches, and guard-rails to be blocked, is to be taken into account as the requirements of the legislature on that subject, and in view of all the facts and situation as to whether that was negligence in failing to block that place. Although the law might require it, still it does not follow, as a matter of course, that, because the law requires it, the defendant was negligent in not complying with it; but that may be taken into account on this subject, and it is for you, on all the facts in evidence and the situation there, to say whether the failure of the defendant to put a block there was negligence. Is that made out? Then consider whether the plaintiff was caught there as he says, whether that is made out—for he has to make that out—consider whether his own negligence contributed in any way to his injury in performing his work there, going in between the cars as he did, if he went in between them, his acts there. Look it all over, consider everything.²

The following requests were given by the court:

If W., when he went in to uncouple the car at and in the vicinity of the switch in question, knew, or, by the exercise

² Gilbert Harmon, Judge, in *The L. S. & M. S. Ry. v. Winslow*, Supreme Court, No. 4357. Settled and dismissed in Supreme Court, but charge affirmed by Circuit Court.

of ordinary observation or reasonable skill and diligence in his department of service, he might have known that he was going to be exposed to the danger and risk of having his foot caught in the movable rail of said switch, and, notwithstanding such knowledge or means of knowledge, he stepped in to uncouple the said cars, he assumed the risks of being so injured, and waived all damages and injury that should thereby result to him.

If the plaintiff, after having a reasonable opportunity of becoming acquainted with the risks and perils of his service, accepts them, he can not complain if he is subsequently injured by such exposure.

The company did not guarantee to the plaintiff the absolute safety and sufficiency of its machinery or appliances, but was bound to exercise only ordinary and reasonable care; that is, such a degree of care and prudence as ordinarily prudent persons or corporations engaged in like business exercise under similar circumstances. The railroad company was not bound to use extraordinary care, nor was it required to do what was impracticable or unreasonable.

If the jury find from the evidence in this case that it was impracticable to so adjust, block, or fill the movable rails of this switch at the place where the injury happened, then it was not negligence on its part in omitting so to adjust, block, or fill the movable rails of said switch.

If the defendant company adopted such methods as were reasonable and practicable for the safe running of its trains, as well as to guard against injury to its employees, at the place where this injury happened, then it used and exercised ordinary and reasonable care, and can not be held liable for any injury happening to said plaintiff at said switch, even though his foot was caught therein.

The omission of the railroad company to comply with the provisions of the statute requiring frogs and switches to be blocked is not, in and of itself, conclusive proof of negligence that will render a railroad company liable for an injury resulting from such omission, but such omission may be and should be considered by the jury in connection with all the other facts and circumstances of the case.

If the jury find that the plaintiff knew how these movable rails were constructed and operated, or, by the exercise of reasonable care and prudence on his part in the performance of his service, should have known thereof, and that the company insisted upon maintaining such condition and construction, and thereafter continued to and did remain in the service of the defendant, then he took upon himself and assumed all the usual risks and perils incident thereto.³

³ Given by request by Harmon, Judge in *The L. S. & M. S. Ry. v. Winslow*. Under the Ohio law the U. S. Circuit Court held that where two railway companies receive cars from each other over a delivery track at a certain point, a person employed by one of them to take the number of its cars and inspect their seals, as trains are made up at such place by the other, is an employee of the latter. *Alkyn v. Wabash Ry. Co.*, 41 Fed. 193.

(7) Injuries at Railroad Crossings.

No. 472. Relative rights of railroad company and public to use railroad crossing.—The right of the railroad company to enjoy the use of its railroad at the crossing of the public highway, and the right of the traveling public to use the highway, are co-ordinate and equal; reasonable care and prudence must be exercised by each in the use of the same; each must so use his own right to cross that he shall not unreasonably interfere with the rights of others to pass over, having in view the nature and necessities of the method of locomotion, and power of control over the locomotion peculiar to each, so that, while the operators of the railroad are to use care, considering the nature of their machinery, the speed with which it is necessary to run a train, the effect of a collision by the train with an object on the crossing, and all other elements of danger entering into it, if there are any, that, under the circumstances, a man of ordinary prudence would exercise; so is he who travels upon the highway to use ordinary care.

Considering the means by which he is traveling, it will be observed that the man on foot, or traveling with a horse and buggy, can much easier control his movements than can the servants of the railway control the movements of the train, so the rule is that each one, with reference to their particular mode of traveling, that they should exercise the care that men of ordinary care and prudence would use under the same or similar circumstances. The defendant had the right to run the train at the time and place of this collision at any speed consistent with the safety which was necessary in the conduct of its business in the usual and ordinary manner, taking into consideration, however, all the circumstances surrounding that crossing affecting the traveling public and having a due regard for the safety of the public using the crossing.

Gillmer, Judge, in *Flemming v. Penn. Co.*, Trumbull County Common Pleas.

If one approaching a crossing fails to look out for approaching trains, he is *prima facie* guilty of negligence. 24 O. S. 676, 677; 28 O. S. 340.

No. 473. Same continued—Both must use faculties to discover danger.—Plaintiff and defendant in this case had co-ordinate and equal right to the use of crossing of the highway and the railroad, and they were each held to the exercise of reasonable care and prudence in the use of the crossing, so as not to interfere unnecessarily with the other. Such reasonable prudence would require both plaintiff and defendant's employees, if in the full enjoyment of their faculties of seeing and hearing, before attempting to pass over a known railroad crossing, to make use of such faculties for the purpose of discovering and avoiding danger, and the failure to do so without reasonable excuse is negligence.

J. H. Day, Judge, in *L. E. & W. R. R. Co. v. Stadler*, Supreme Court, unreported, No. 2870.

No. 474. Duty (of deceased) to use senses upon approaching railroad crossing—Another form.—"The deceased was bound to use the same care in protecting himself that the defendant company was bound to use in seeing that no person came to injury by the management of its cars and engines. That is, he was bound to use such care and prudence as a reasonable, prudent man would use in protecting himself against any injury. It was his duty to use his senses, in approaching the railway track, to discover whether or not there was an approaching train or locomotive which might injure him, to make such reasonable use of his eyes and other senses as a reasonable and prudent man would make, and if, by the use of them, he could have avoided the danger, then he can not recover from the company. But if he exercised such care as a reasonable and prudent man would exercise, and if the defendant was guilty of neglect in the running of the engine, and the deceased was killed by reason of that, then the company is responsible."

From *Railway Company v. Schneider*, 45 O. S. 678. "It was the duty of the deceased in approaching the railroad crossing, to look for the locomotive before attempting to cross; and if his failure contributed to the accident, the plaintiff can not recover, even though the defendant's negligence contributed to the injury."

"Even though the fireman and engineer were guilty of neglect contributing to the injury, yet that did not absolve the deceased from exercising the precaution of looking and listening for the approach of trains at such point on the street as would enable him to discover the approaching train or locomotive; or from approaching the crossing at such gait as would enable him to control his horses promptly." From *Railroad Co. v. Schneider*, 45 O. S. 678.

No. 475. Injury caused by backing train onto vehicle at crossing.—You must find that the backing of the train onto the wagon, resulting in the injury, was done by the servants

of the defendant railway under such circumstances as evidences want of ordinary care on the part of such servants, showing negligence on their part. If the backing was accidental and without volition on the part of the agents or servants of the defendant, then it would not be chargeable with the negligence or liable for an injury resulting therefrom. To make the defendant company liable for the injury in this case it is imperative that it be made to appear by evidence that the agents of defendant in charge of the train negligently backed the train and produced the injury sought to be recovered for by the plaintiff in this action.

If the train of defendant was standing still, with its rear end occupying a part of the public crossing only, there remaining space sufficient for the passing and repassing of teams, it would be the duty of the servants and agents of defendant, before backing or running said train farther onto or across such crossing, to first make use of their faculties of seeing and hearing to ascertain if there was danger of injuring someone, to learn if the crossing was occupied or not, and to be careful so as not to unnecessarily inflict any injury. And if the agents and employees omitted to use their faculties, but instead, without warning or signal, suddenly backed their train onto the said crossing and injured plaintiff, the said employees and agents would be guilty of negligence, so as to make the defendant company liable for any resulting injury.

J. H. Day, Judge, in *L. E. & W. R. R. Co. v. Stadler*, Supreme Court, unreported, No. 2870 (14, 708).

See ante, No. 465.

No. 476. Omission to ring bell and sound whistle.—

The law requires that every railroad company shall have attached to each locomotive engine passing upon its road a bell of the ordinary size in use on such engines and a steam whistle; and the engineer or person in charge of the engine in motion, and approaching a public highway or town-road crossing, upon the same level therewith, shall sound such whistle at a distance of at least eighty, and not further than one hundred, rods from the place of such crossing, and ring such bell continuously until the engine passes such road crossing; and such company employing such engineer or person in charge of the engine shall be liable in damages to any person injured, in person or property, by such neglect or act of such engineer or person.¹

In regard to that statute the jury are instructed that the omission to ring the bell or sound the whistle at public cross-

¹ R. S., Sec. 3336.

ings is not sufficient grounds to authorize a recovery, if the person injured, notwithstanding such omission, might, by the exercise of ordinary care, have avoided the accident; but if the person injured by reason of such omission to ring the bell or sound the whistle could not, by the exercise of ordinary care, have avoided the accident, he would be entitled to recover damages under that statute because of such omission.

Therefore, if the jury find from the evidence that plaintiff's intestate was injured by the negligent omission to ring the bell or sound the whistle upon defendant's locomotive, and that, by the exercise of ordinary care, he could not have avoided the injury, then plaintiff will be entitled to recover damages because of such negligence and injury inflicted thereby.

If the jury believe from the evidence that the engineer sounded the whistle from a point more than one hundred rods to a point nearer than eighty rods from the crossing where the accident occurred, such sounding of the whistle was a substantial compliance with the requirements of the law in that behalf.²

² F. Douthitt, Judge, in *P. C. C. & St. L. Ry. v. Adams*, S. C. 3671. Judgments affirmed. Harrison County. The failure to give signals must have been the proximate cause of the accident before recovery can be had. *Penn. Co. v. Rathgeb*, 32 O. S. 72.

No. 477. Same continued—Duty of the injured to use his faculties—Must look and listen.—The same duty was upon him in approaching a known railroad crossing as upon defendant, and he must use his faculties of seeing and hearing to detect and avoid danger. He must look and listen to ascertain if there is danger, and to avoid it. If he fails to do this, he is not in the exercise of ordinary care, but is negligent. I may say if plaintiff looked and listened in this case, and saw the train standing still, with no evidence of activity or intention to move back, and no signal was discovered or heard of an intention to move back, he would be at liberty to drive onto and across the railroad, and would not be subject to the charge of negligence. If, however, he omitted these things, and without exercising ordinary care, and without care, drove onto the crossing in the presence of a moving train, or a train that had signaled and given notice of its purpose to move across the crossing, in such case the plaintiff may not recover.

J. H. Day, Judge, in *L. E. & W. R. R. Co. v. Stadler*, Supreme Court, unreported, No. 2870 (14, 708).

See ante, Sec. 465.

No. 478. Duty of person in vehicle approaching railroad crossing—"Look and listen."—It is a duty of a person approaching a known railroad crossing to look and listen for an approaching train and to make use of his senses to ascertain if there is a train in the vicinity, and if, being in full possession of his faculties, he fails to take such precautions without reasonable excuse therefor, when a prudent man, exercising his senses, would have discovered a train in close proximity, and such failure contributes to produce injury, he is guilty of negligence, and there can be no recovery.¹ It is the duty also of the defendant company by proper signals, and in a manner that would ordinarily communicate to the plaintiff approaching the crossing, that the defendant's train was approaching the crossing, but that its notice must be given so that the plaintiff could protect himself from injury.

If you find from the evidence that there was a place on the east side of ——— Street where the train could be seen as it approached the crossing, and further find that the train could have been seen by the plaintiff from that space as he passed, and he failed to look, without a reasonable excuse therefor, he was guilty of negligence, and if such negligence contributed to produce the injury, then he could not recover.

It is because railroad crossings are dangerous that it is the duty of persons approaching them, and about to cross, to be careful. Any circumstances or obstruction which increases the danger of crossing increases the duty of vigilance to avoid the injury.

(a) *Must use senses, etc.*

It is the duty of a person approaching the crossing in a buggy to assure himself, if he can by the use of his senses of sight and hearing, that no cars are in dangerous proximity, or, if necessary in the exercise of ordinary care to make such observations, he would be required to reduce the rate of speed, or even to stop his conveyance so as to ascertain whether or not he could cross the track in safety; but in this case the law does not require a vain thing, and if there were buildings and obstructions which would have prevented the plaintiff from seeing the approaching train if he had turned his eyes in that direction, that he was not bound to look at such point, and failure to do so would not be negligence.²

¹ C. C. & I. Ry. v. Elliott, 28 O. S. 340; Railway v. Geiger, 8 O. C. C. 41.

² Gillmer, Judge, in Flemming v. Pa. Co., Trumbull County Common Pleas.

Where buildings and obstructions obstruct view, for degree of care in, see Wood on Railroads, Sec. 323; Dimmick v. Chicago, etc., R. R. Co., 80 Ill. 338.

No. 479. Negligence—Sounding whistle and ringing bell at crossing.—If you find that the whistle of the locomotive was sounded and the bell rung at such time and place, and under such circumstances, as would notify persons in the vicinity of the crossing of the approach of the train, and you further find that, after the plaintiff was known to be in the place of danger, all reasonable and proper efforts were made to prevent injuring him, then the defendant would not be guilty of negligence in this regard.

Gillmer, Judge, in *Flemming v. Pa. Co.*, Trumbull County Common Pleas; R. S. Secs. 3336, 3337.

No. 480. Negligence of railroad company in failing to station flagmen at street crossing.—If you find from the evidence that the railroad company, by reason of the speed it ran its trains across ——— Street, its number of tracks, or having cars standing on the tracks near said crossing, or the existence of buildings or other structures at or near said crossing, rendering the use of ——— Street dangerous to the public, you are instructed that the company was under obligation to employ reasonable care and prudence in providing safeguards for the protection of persons lawfully passing along said street and over said railroad tracks, and commensurate with the dangers of the locality so created by the company, to persons exercising their rights to pass over and along said highway in a reasonable manner. It is left for you to say from the evidence, under all the circumstances, whether a flagman ought to have been employed by the company, and whether it would be negligence on the part of the defendants not to have done so at the time of the injury; and if the defendant was guilty of negligence in these respects, and the decedent was not in fault, and sustained said injury therefrom, the plaintiff would be entitled to compensation therefor, if in other respects, you find that he is entitled to recover under the instructions given you.

If the decedent knew that a flagman was employed by the company at the crossing, and had good reason to believe, and in good faith believed, that one was so employed at the time of the injury, and you further find that it was the duty of the company so to employ a flagman, the decedent might presume, in the absence of knowledge to the contrary, that he was properly discharging his duties, and it was not negligence on her part to act on the presumption that she was not exposed to danger, which could arise only from the disregard by the flagman of his duty;¹ and if the flagman was then absent

¹ *Schneider case*, 45 O. S. 678.

from his place of duty, or was not giving any signal or warning when she attempted to pass over the crossing, she might presume that no train was approaching which would make it dangerous for her to attempt to pass over the crossing, in the absence of other knowledge to the contrary.²

² Voris, Judge, in Gaston, admr., v. Lake Shore R. R. Co., Lorain County Common Pleas.

Flagman and Gatemen.—In the absence of statute, the omission to maintain flagman may be considered as part of *res gestae* with other facts as bearing upon prudence or negligence of company. 78 N. Y. 518; 66 Mich. 150; 74 Wis. 240; 74 Wis. 514; 101 Mass. 201; Beach Contrib. Neg., p. 247; Patterson Ry. Acc. Law, 163. At an exceptionally dangerous crossing, a company is bound to exercise care proportioned to the increased danger, and should maintain flagman, gates or gatemen. Ry. Co. v. Schneider, 45 O. S. 678. A traveler approaching the crossing may presume that the gatemen will properly do their duty. Id. There is no rule of law requiring a railroad company to erect gates, or keep flagman at crossings outside of a city or village. L. S. & M. S. Ry. v. Gaffney, 2 Oh. Dec. 212 (C. C.)

If a railroad company voluntarily establishes a gate at a crossing, there is an implied assurance that the tracks may be safely crossed if the gates are open. Jaggard on Torts, 881.

No. 481. Duty of railroad company and traveler at crossing—Unobstructed and obstructed view—Reliance upon signals or flagmen.—Judge Wright of Hamilton County Common Pleas, in Frederika Leisor v. C. H. & D. R. R. Co., with reference to the duty of the railroad company and of the person approaching the crossing, thus charged the jury:

"The common precaution is to look both ways and listen. Perhaps where the view of the track is unobstructed and sufficiently wide, it satisfies the rule simply to look, otherwise the common law is that one should also listen. Where the view is obstructed, the caution must consist mainly in listening, it may be a duty to produce quiet by stopping. If the railroad company employ a flagman, gate or other device to warn people of approaching danger, a traveler is not negligent who, instead of looking and listening, follows the signals, unless he reasonably knew aside from the signals that danger was actually imminent. But, on the other hand, a traveler who relies upon the signals rather than upon his own faculties is negligent if he disregarded the signals.

"The matter may be summarized thus: A railroad track is commonly a place of danger. He who undertakes to cross, to be free from negligence, must take such precaution to ascertain the imminence of danger as an ordinarily prudent man would take under like circumstances. And if you believe from the evidence that the driver might, by the exercise of ordinary care and caution, have become aware of the danger and have avoided it, that he omitted to exercise such

care and caution, and that his omission to do so directly contributed to the injury, then he was guilty of negligence.

See *R. R. Co. v. Schneider*, 45 O. S. 678.

No. 482. Injury to foot traveler crossing track.—If a passing train on another track, or escaping steam, or any other temporary cause obstructed or obscured her view or hearing, then the court says to you that it was her duty, before attempting to cross, to wait until such temporary cause had passed away, and if she attempted to cross without thus waiting, she did so at her own risk, and if injured while thus crossing, she can not recover, if you find that, by waiting until such temporary cause had passed away, she could have crossed in safety.

The necessity or importance of her being at the factory immediately or promptly would be no excuse for her not waiting until she could cross in safety, or justify her in taking any risks; neither would absent-mindedness, thoughtlessness, forgetfulness, or inattention.

If you find that plaintiff failed to look east for the train, that is not merely evidence of negligence from which you may or may not infer it, but it is, in and of itself, such negligence as prevents her from recovering, if, by thus looking, she could have seen the approaching train in time to have avoided the injury. And it was equally her duty to listen as well as look, and to do both attentively and carefully until across the track. And it is the duty of every person of mature years and sound mind, about to cross a railroad track, not only to look and listen, but to exercise all their other senses and means of knowing to ascertain if a train is approaching, and if they fail to do so without a reasonable excuse therefor, and are thereby injured while crossing, they can not recover.

If an adult person in full possession of her faculties goes upon a railroad track and voluntarily stops or stands thereon, not being an employee of the railroad company, and omits to watch for the approaching trains, she is, *prima facie*, guilty of such negligence as will prevent her recovering for injuries while so on the track; and before she can recover, she must show that it was not reasonably practicable to keep such lookout, or that which would ordinarily induce a person of common prudence and circumspection to omit such precaution.

If the plaintiff failed to look and listen, she was guilty of such negligence as will prevent her recovering, if, by proper and prudent looking and listening, she could have ascertained and avoided the injury, and also, if she looked and listened and did not see or hear the train when, by the exercise of

ordinary care and attention, she might have done so and escaped injury, then in law she looked and listened carelessly and negligently, and is equally culpable, and in either case she was guilty of such negligence as will prevent her recovering a verdict, if you find that her negligence or failure aforesaid contributed to her injury, in whole or in part, unless you find that it was prudent and proper for her, under the circumstances, to omit looking and listening before going on the track, and also while standing upon it, if she did.

Gillmer, Judge, in *Huron v. N. Y. L. E. & W. R. R. Co.*, Portage County Common Pleas.

See ante, No. 460.

No. 483. Duty as to sounding whistle at crossing and carrying headlights.—By the statute of Ohio it is made the duty of an engineer in charge of a locomotive, when approaching any road-crossing, to sound the engine whistle a distance of not more than one hundred rods, or less than eighty, from said crossing, or to ring the engine bell continuously from said place until the engine and cars pass such road-crossing; and a person passing over such road-crossing has a right to presume that the engineer will act in accordance with the statute. A railroad company, however, owes no duty to the general public, who are not its passengers or employees, to carry a headlight on any of its trains, and no law requires it to do so.

Absence of a headlight, failure to ring the bell or blow the whistle did not excuse or relieve the plaintiff from exercising due care and caution in looking and listening for the train; she was bound to exercise such care and caution, notwithstanding the railroad company may have neglected these things.

Rev. Stat., Sec. 3336.

No. 483a. Injury to child climbing over railroad train stopping on crossing in violation of statute—What is negligence under such circumstances.—If you find, as a fact, from the evidence in the case, that the train in question did not occupy the street-crossing for a period of more than five (5) consecutive minutes, or if you should find that such train did occupy said crossing for more than five (5) minutes, but not unnecessarily, then the fact of the train occupying said crossing is an immaterial matter in this case, and it is not to be further considered by you. If, however, the plaintiff, by a preponderance of the evidence, has proven that said train did occupy said street-crossing for a period of more than five (5)

consecutive minutes immediately preceding the injury occurring to the plaintiff, and that said occupancy was not necessary, then the fact of such unnecessary occupancy may be considered by you, together with any other proper facts and circumstances that may be in evidence in the case, as bearing upon the negligence of the defendant. If such train did so unnecessarily occupy said crossing for more than five (5) consecutive minutes, there was not, on that account and as a matter of law, any obligation upon defendant's servants to sound a whistle, ring a bell, or do any other specific act before starting said train in motion either backwards or forwards; but under such circumstances, defendant's servants would be bound to do anything, and to leave undone nothing that an ordinarily prudent man, under all the circumstances, would have done. Any precaution that an ordinarily prudent man would have taken under the circumstances, and any warning he would have given, the defendant was bound to give; and if the ordinarily prudent man would have taken no precaution, or would have given no warning, the defendant was then bound to take no precaution, or to give no warning.

The law did not, at the time of the injury complained of, require the defendant company to prevent persons or boys from going upon or between the cars of its train while the same was at rest over the street crossing in question, and so a failure upon the part of the defendant to warn or prevent plaintiff from so attempting was not an act of negligence upon the part of the defendant that would entail liability upon the defendant, unless you find that the defendant or its employees had knowledge that plaintiff was upon or between its cars, or unless you find that an ordinarily prudent man, under the circumstances, would by some precaution have known that the plaintiff was upon or between its cars.

If you should conclude from the testimony in the case that the defendant or its employees were not guilty of any negligence, then your inquiry may cease, for in such case your verdict should be for the defendant, no cause of action.

If you find that the defendant or its employees were guilty of negligence, you will then determine from the evidence whether or not the negligence caused the injury complained of. And if you find that the defendant was negligent, still the plaintiff shows no right to recover unless it should be proven that the negligent act caused the injury to the plaintiff, and that the plaintiff was free from contributory negligence, as I shall hereafter charge you.

No. 483^b. Same continued—Whether child climbing over train guilty of contributory negligence.—If you should find that the defendant was negligent, and that such negligence caused the injury, you will go on and determine this further question: "Was the plaintiff, at the time of the injury complained of, himself in the exercise of ordinary care, or did his own negligent act contribute to his own injury?" This question becomes important from the fact that if it should be your conclusion from the testimony in the case that the plaintiff was injured as the result of the want of due care of both the plaintiff and defendant, then the plaintiff could not recover. The plaintiff, to recover, must be free from all negligence on his part.

The plaintiff here was, at the time of the injury, an infant of the age of nine (9) years and two (2) months. While a child of that age is not bound to take all the precaution and exercise all the care that an adult would be required to take and exercise, yet this plaintiff was required to use all care that an ordinary prudent boy of his age and capacity would have exercised. And if you should find from the testimony that plaintiff, by reason of his educational advantages and experience, was of more than ordinary capacity, then it is his capacity, as you find it to exist, that must measure his duty to detect and avoid danger.

Hence, if you should find from the testimony that the plaintiff knew that it was dangerous to go between the freight-cars at the time in question, or if you should find that an ordinary prudent boy of his age and capacity would not have gone between the cars, under the circumstances as you shall find them, then the plaintiff was guilty of negligence and can not recover. It is not necessary that plaintiff should have apprehended the injury that did occur; all that is necessary is that he knew, or should have known, that the situation was dangerous, and that an injury of some kind would probably befall him in that situation.

If you should find that the injury happened without the want of care of either plaintiff or defendant—that is to say, if each party was not negligent—then the injury would be the result of a mere accident, and, of course, in such case the plaintiff could not recover, but your verdict should be for the defendant—no cause of action.

If, however, it should be found by you that the defendant company was negligent, and that said negligence caused the injury complained of, and you should further find that the plaintiff, at the time of the occurrence of said injury, was in the exercise of the due care to which he was bound, as I have

charged you, then, and not otherwise, is the plaintiff entitled to recover in this action.

W. T. Mooney, Judge, in *L. E. & W. Ry. v. Mackey*. Approved in 53 O. S. 370.

(8) Miscellaneous Cases relating to Railroads.

No. 484. Duty to keep light at railroad switch.—As to whether it was the defendant company's duty to have had a light at the switch in question at the time of the accident, is a question for you to decide under the rule for ordinary care which the court has given you, from all the facts and circumstances proven in the case.

The infrequency of business over the road at night, up to the time of the accident, the custom of railroad companies under similar circumstances up to that time, so far as proven, the method of the use of switches of the character shown; the straightness or curvature of track approaching the switch in question; the grade of the track; the character of the vicinity as to being thickly settled or otherwise, or as to obstruction or freedom of view from a distance; the necessity of keeping a man to attend a light or otherwise, all these are among the circumstances so far as they may have been subjects put in evidence, which are proper for your consideration in determining this question.

George F. Robinson, Judge, in *N. Y. P. & O. R. R. v. Tidd*, Supreme Court, No. 2507. Affirmed by Circuit Court.

No. 485. Misplacement of switch for criminal purpose.—The defendant company can not be held responsible for the death of one of its employees caused by circumstances of which it had no knowledge or notice long enough before his death to have interposed to save him, or which circumstance or circumstances it had not reasonable ground to expect or anticipate would occur when and where they did occur.

The law does not require a railroad company in Ohio to anticipate or presume that a criminal will break or open its locks and misplace its switches in the night. Nor is there any rule of law that requires a railroad company to keep either a man or a light at every switch at all times.

The presumption of law is that criminals will not break and misplace railroad property; and the railroad company may safely rely on this presumption till the contrary fact is, in any case, brought to their knowledge, or until, from known facts, they have reasonable cause to expect or anticipate it.

If you find from the testimony that the switch was misplaced by someone for criminal purpose, and that the misplacement of the same was unknown to defendant, or, with the exercise of ordinary care, could not have been known by it in time to avert the danger and prevent the injury, or, with the exercise of ordinary care on its part, could not have been made known to those running the train in time to prevent the injury, the defendant would not be liable for such displacement and consequent injury, unless such displacement could have been prevented by the exercise of ordinary care on its part. . . .

Geo. F. Robinson, Judge, in *N. Y. P. & O. R. R. Co. v. Tidd*, Supreme Court, No. 2507. Affirmed by Circuit Court and see.

Misplacement of switch by evil disposed person, causing injury, regarded as an inevitable accident. *Frust v. Potter*, 17 Ill. 416; *Deyo v. N. Y. R. R. Co.* 34 N. Y. 9.

No. 486. Walking on railroad track—Injury to person from—Company bound to give warning in case of knowledge.—“If it be found from the testimony that the plaintiff, at the time he was injured, was walking upon the main track of a railroad, and was not using the county road as a crossing to reach the point he wished, the fact that no signal was given by the engineer in charge of the engine of the moving of the engine and cars attached toward the crossing would not be such neglect as would render the company liable for the injury, unless the conductor or engineer in charge of the train or engine knew, at the time the train was being backed, that the plaintiff was on the track, and they then failed to give him warning, by signal or otherwise, of the approach of the train in the same direction on the same track.”

From *Railroad Company v. Depew*, 40 O. S. 121.

No. 487. Rescuing one from danger—Injury while attempting to rescue—Contributory negligence.—“To hold the railroad company responsible in damages for injury to a person who is struck by an engine and injured while in the act of crossing the track and rescuing a little child from danger and saving its life, it must be shown (1) that the child was in danger of being run over and injured by an approaching engine, and that such danger was caused or created by the negligence of the railroad company; and (2) that in making the effort to rescue the child the plaintiff was not guilty of contributory negligence. These are questions of fact which it will be your duty to determine from the evidence.

“If you find that the peril to which the child was exposed was caused by such negligence of the company, you

will then inquire whether the plaintiff, in passing across the track and attempting to rescue the child, was guilty of contributory negligence. The law will not impute negligence to an effort to save human life unless made under such circumstances as to constitute rashness in the judgment of prudent persons.

"If he believed, and had good reason to believe, that he could save the life of the child without serious injury to himself, the law will not impute to him blame for making the effort."

Penna. Company v. Langendorf, 48 O. S. 316. In the opinion in the above case, Bradbury, Judge, says: "The attendant circumstances must be regarded; the alarm, the excitement and confusion usually present on such occasion, the uncertainty as to the proper move to be made, the promptness required, and the liability to mistake as to what is best to be done, suggest that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one, who, under these or similar circumstances, springs to the rescue of another, thereby encountering even great danger to himself, is guilty of negligence *per se*, is neither supported by principle nor authority."

No. 488. Injury to child of employee.—"Although the defendant varied from the usual manner of using the track in question, yet if the plaintiff was not there as an employee of the company, but was there wrongfully, he can not complain of the negligence of the company unless the defendant's agents knew that he was there, and willfully injured him."¹

"If you find that the defendant company and another company were each rightfully in the joint use and occupation of the transfer track, and the father of the plaintiff, then in the employment of the other company, duly authorized, was engaged in repairing a car upon this track; that the plaintiff brought to him his dinner, and that while engaged in repairing said car, shortly thereafter, the father requested the plaintiff child to render him necessary temporary assistance to enable him (the father) to perform the work of repairing the car, if he was thus authorized to employ the plaintiff, then the plaintiff was rightfully upon the track."²

¹ From Penna. Co. v. Gallagher, 40 O. S. 637.

² From Penna. Co. v. Gallagher, 40 O. S. 637.

No. 489. Common use of railroad tracks by public as a passageway.—You are instructed, as matter of law, that the plaintiff was not a trespasser by going upon the track in question. That is, if you find from the proof in the case that the railroad company had knowledge that its tracks were being used at this point by people to go to and from their work at the mill or other places, and that the railroad company had

knowledge of such use of its tracks and acquiesced therein, and the plaintiff was not bound to go to his work by any particular route, and had a right to go upon and over the track where he was when injured, but in doing so it was his duty to exercise ordinary care to prevent being injured. . . . If these tracks in question were used by the public indiscriminately as a place of travel to the mill or other places, then it would be the duty of the company to so run its trains and to exercise ordinary care in the use of its trains with a knowledge of the way in which it permitted its tracks to be used.

Gillmer, J., in *Burke v. Hitchcock*, Trumbull County Common Pleas.

Long accustomed usage of a passageway on tracks of company by trespassers, charges the company with notice and it is under obligation to keep a careful lookout at such places. Wood on Railroads, Sec. 320.

No. 490. Joint occupancy of sidetrack by two companies—Relation of servants of one company to the other—Injury to servant by failure to inspect track.—Where a sidetrack or transfer switch is in the joint occupancy of two railroad companies, the servants of each company are not the servants of the other, nor fellow-servants with the servants of the other, but their right of recovery in case of injury caused by the negligence upon the part of the other company, in operating said track or switch, or in the carelessness of its servants, is an independent one. In this class of cases the injured person is more than a mere licensee. The relation between the railway whom he serves and the other railway is so far founded on a valuable consideration that it raises upon the part of that other railway an implied obligation that it will not be negligent as against that servant.

Though the — Company's cars stood on the defendant's transfer switch, through the trespass of said company, it would not absolve the defendant from the exercise of ordinary care in the proper inspection of the same as to such obstructions, and in so using said switch and handling said cars as not to injure the servants or property of said — Company on its own railroad and premises. If you find by a preponderance of evidence that the transfer track or switch was in the joint occupancy of the two railroad companies, and the plaintiff's injury was caused by the negligence on defendant's part in not properly inspecting the said track to avoid obstructions thereon, and in handling cars found standing thereon, whereby the collision and injury occurred, your verdict should be for plaintiff, otherwise for defendant.

Michael Bulger v. N. Y. L. E. & W. R. R., Supreme Court, unreported. Judgment of C. C. reversed and Common Pleas affirmed, 28 W. L. B. 128.

No. 491. Liability of railway company for injury to person standing on depot platform, from mail-pouch thrown out of mail-car by the mail agent.—If you find from the evidence that the mail agent was in the employ of the post-office department of the United States government, and was not in the employ of the defendant railway company, and was not under the control or direction of the defendant company, or any of its agents or employees, then said defendant would not be liable for any of his negligent acts. If you find the defendant railway company was negligent in carrying the United States mails on its trains, it was its duty to make such arrangements for the delivery of such mails at the stations, as not to unnecessarily endanger the passengers of said defendant company, or those lawfully on its platform and grounds. And if it was required of the said defendant company by the postoffice department of the United States to deliver the mail-bags on the platform of the depot at —, it was the duty of the said defendant company either to stop its trains at —, or to run its trains at such rate of speed past said depot as not to unreasonably endanger the passengers of said company, or those lawfully on its platform or grounds, or to so guard said platform and to give notice to the people lawfully thereon, as not to expose them to unnecessary or unreasonable danger.

And if said railroad company ran its trains at such unreasonably high rate of speed past said station, and knowingly permitted the mail agent to throw off the mail-bags upon the platform of said station, without giving due notice to the persons lawfully thereon, or in some way protecting them from the danger thereof, said railroad company would be liable for any damage caused by the negligence of the agents and servants of the company in running said train, and in permitting said mail-bags to be thrown off without due notice to the persons lawfully on said platform, or in some other way protecting them from unreasonable and unnecessary danger. It is left to you as a question of fact to say whether the train to which the mail-car was attached was run at such high rate of speed as to be negligence on the part of the company, or whether the agents or servants of the company were negligent in failing to give due notice to the plaintiff that the mail-bag was about to be thrown upon the platform, or in protecting plaintiff from injury therefrom.

Nye, Judge, in *Clarke v. N. Y. P. & O. R. R. Co.*, Medina County Common Pleas; see 136 Mass. 552; 97 N. Y. 494.

No. 492. Child killed on railroad track—Whether a trespasser.—This boy was on the railroad track of the defendant when he was killed. It is one thing if he was justified in being there, and it is another thing if he was not so justified. The plaintiff says he was justified in being on the track, or was not in fault for being there; and they have given evidence to support them in this claim tending to prove that there was no fence along the railroad track, the manner in which the wings or abutments of the R. R. bridge were constructed, that there were no guards, signs or other means of prevention at said bridge to keep children from going upon the tracks, and that the station agent on two occasions had seen boys on the track in that vicinity within a year or more preceding this accident, on one of which occasions he ordered them off. Now, gentlemen, I charge you that this evidence does not tend to prove that the deceased had any justification or excuse for being on the railroad track, and you are in this case to take it that the deceased was on the railroad track without right and by his own fault, and therefore the defendant is not accountable in this case for how the train was manned or equipped, or the position of the men on the cars, or who they had as a station agent, or whether he was a cripple or not.

John W. Heisley, Judge, in Spink case, Cuyahoga County.

No. 493. Duty of railroad company to persons trespassing on track—Duty arises only after discovery.—The law imposed no duty upon the defendant to require its station agents, watchmen, flagmen or switch tenders having duties to perform at certain points, to watch over the tracks of the roadway from such places of their special duty, to warn persons on the track without right, and having no business with the defendant, to get off the track, or otherwise caution them. The defendant is only accountable for the action of its employees after they had discovered or had reason to think or believe the deceased was on the track and in danger of being hurt; after they had discovered the boy on the track, or had reason to think or believe he was there, they had, of course, no right to wantonly run over him. But the servants of the defendant who had any duties to perform in regard to the running of this train, did their whole duty if they did all they could with the means they had, adapted to that purpose, to avoid injury to the deceased. Strictly the defendant is not liable in this case, unless its said servants who had duties to perform in reference to the running of this train, after the boy was discovered, or they had reason to believe the boy

was there and in danger, acted with such a want of care and with such a reckless disregard of the consequences as is difficult to be distinguished from an intentional wrong. If they acted with this recklessness and want of care, your verdict should be for the plaintiff; otherwise it should be for the defendant.

John W. Heisley, Judge, in Spink case, in Cuyahoga County, O.

A railway owes no duty to a trespasser on its track further than to refrain from inflicting a willful or malicious injury. Wood on Railroads, Sec. 320.

No. 494. Measure of damages for death of child.—If you find for the plaintiff, in assessing damages you are not to consider the mental pain and anguish of the parents on account of this misfortune. This is, as the law provides, only a matter of dollars and cents, and you should allow a just compensation for the pecuniary injury resulting to the parents, and in getting at this, you will as best you can get at what is the reasonable expectation of pecuniary advantage to them from the life of this boy if he had lived, and it is for you to consider all his characteristics, and how long he might have otherwise lived, or how soon have died, and all the circumstances that throw any light on this part of the controversy. If you find for the defendant you will simply say so.

John W. Heisley, Judge, in Spink case, Cuyahoga County.

No. 495. Permitting persons to travel habitually over railroad track.—If you find from the evidence in this case that the defendant companies, for a long time prior to the accident complained of in the petition, permitted persons to travel and pass habitually over their road at the point where the accident occurred without objection or hindrance, they should, in the management of trains so long as they acquiesce in such use, be held to anticipate the continuance thereof, and are bound to exercise care, having due regard to such probable use and proportioned to the probable danger to persons so using such crossing, and if you find they did not exercise such care, and that the plaintiff exercised reasonable care on his part, then your verdict on this branch of the case should be for the plaintiff.

From *Caldwell v. P. C. & T. R. R. Co.*, 51 O. S. 609. The Common Pleas Court was reversed, but this charge was not affected thereby.

See ante, No. 489.

No. 496. Negligence—Injury to stock on railroad.—“If the jury find that the horse, though seen by the engineer, was running upon the track, if he left it and continued to

run, not near enough to have been in danger, and the whistle was blown, and the horse returning to the track, the brakes were applied and the train was checked, but could not probably then have been checked before the horse was struck by the train, the plaintiff can not recover on the ground of the negligence or carelessness of the defendant in running the train."

From *Railway Co. v. Smith*, 38 O. S. 410.

No. 497. Same continued—Insufficient fence—Liability of railroad company for.—"The company being bound to maintain a sufficient fence, the plaintiff had a right to rely on this, and to turn his horse into the inclosure; and if he escaped therefrom by reason of the insufficiency of the fence, and went upon the track and was killed, the company is liable."

From *Railway Co. v. Smith*, 38 O. S. 410.

No. 498. Railroad companies required to guard against fire from locomotive.—Railroad companies are in no sense insurers, but in this state are required by statute, in the use of their engines, to prevent loss or damage by fire, to place on their locomotives, or engines, and keep in good order, some device or contrivance that will most effectually guard against the emission of fire and sparks which would otherwise be thrown out by such engine, or locomotive, or cars, having regard to the enterprise in which they are engaged and the objects to accomplish, and the law places no higher or further duty upon them than in this particular; and when they have performed that duty required of them by statute, they are not responsible for accidental fires caused by the escape of sparks thrown from their engines.

Approved in *The L. & M. R. R. Co. v. Kelly*, 10 O. C. C. 322, 327.
C. L. & W. R. R. Co. v. Fredenbur, 8 C. C. 23.

(9) Miscellaneous Cases not Pertaining to Railroads.

No. 499. Negligence—Injury from defective gun.—"The action from which the following is taken was one for negligence for wrongful death caused by a defective gun, which, on account of the defect therein, discharged while in the hands of the defendant, killing the deceased who was a little in advance of the defendant.

In your investigation of matters which are here submitted to you, you will first proceed to inquire and determine whether or not this gun was defective. If you find that it was not, upon this branch of the case the defendant will be entitled to a finding in his favor. If you find that it was thus defective, then you are to inquire and ascertain whether or not the defendant had knowledge of its defective condition; or if he had not actual knowledge, would he by the exercise of ordinary care have known of this defective condition? If you find that he neither had knowledge, nor by the exercise of such ordinary care would not have known of the defects claimed on the part of the plaintiff to exist in this gun, then upon the question as to the defective gun alone being the cause of the accident, the defendant would be entitled to a finding in his favor; if on the other hand you find that this gun was defective in the particulars complained of, and that the defendant knew of this defect, or by exercising ordinary care would have known of the defect, then upon this branch of the case the plaintiff would be entitled to a finding in her favor.

Johnston, Judge, in *Lechleitner v. King*, Trumble County Common Pleas.

No. 500. Same continued—Charge that gun was negligently carried, thus causing death.—It was the duty of the defendant in carrying the gun to exercise ordinary care for the safety of the deceased; and if his failure to exercise such care was the proximate cause of the injury resulting in the death of the deceased, then the plaintiff will be entitled to recover in this case, provided you find that the deceased himself was in the exercise of ordinary care at that time. It was the duty of the deceased to exercise ordinary care for his own safety, and if you find that he failed to exercise such care, and that his failure to thus exercise such care contributed to produce or cause the injury resulting in his death, then the plaintiff would not be entitled to recover in this action.

Johnston, Judge, in *Lechleitner v. King*, Trumbull County Common Pleas.

No. 501. Action for injury to house resulting from use of dynamite in blasting.—The owner of land blasting rocks thereon so as to cast them upon another's premises and cause injury is liable for the damages so occasioned, whether negligent in blasting or not. (7 Am. Eng. Cycl. 522.)

If you find from the evidence in this case that the defendant, — Ry. Co., blasted rocks or stones on its right of way,

and thereby threw stones upon the premises and buildings of the plaintiff and caused injury to their buildings and property, the defendant company would be liable for the damages so caused and occasioned.

If you find from the evidence that the defendant company blasted stones or rocks upon its right of way, or roadbed, near to and adjoining the premises of the plaintiff, and in so blasting it used such charges of dynamite, or other explosives, as to jar and shake the dwellinghouse of the plaintiff, whereby it was injured, the defendant company would be liable for the damages so occasioned, if any.

Whether the plaintiff's house was injured, the walls and plastering cracked, or any other damage done to the dwellinghouse of the plaintiff by said explosives and blasting, are questions of fact for you to determine from the evidence which has been given to you.

Nye, Judge, in *Schaible v. L. S. & M. S. Ry. Co.*, Lorain County.

No. 502. Same continued — Measure of damages.—If you find that the plaintiffs are entitled to recover in this action, they are entitled to receive such a sum as will fairly and reasonably compensate them fully for the injuries and damage they have sustained by reason of the acts of the defendant, not exceeding, however, the sum of \$2,000, the amount asked for in their petition.

The measure of damages in this case is compensation, and that properly includes any and all injuries that you find that the plaintiffs have sustained to their buildings or other property, and damages to the use of the said property by reason of the acts of the defendant company.

You will look into the facts and circumstances and see what sum will fairly and justly compensate them for their injuries. It is a question for your sound judgment to determine under all the evidence in the case.

Nye, Judge, in *Schaible v. L. S. & M. S. Ry. Co.*, Lorain County.

No. 503. Negligence and liability of owner of racetrack for injury to driver from defect in track.—A defendant, by advertising a fair and horseraces to take place on his racetrack, and offering premiums to winners of such races, invited those persons desiring to compete for such premiums to enter their horses in such races and to employ persons to ride their horses in such races; and by that action on his part a defendant impliedly warranted to all such persons and riders that his track was reasonably well constructed for the purpose for which it was to be used, and that ordinary care had been

used by him to protect and guard it against danger to those engaged in riding horses in said race.

And the plaintiff, if he had no knowledge to the contrary, might rely upon such warrant. And the defendant will be charged in law with a knowledge of the existence of any and all defects which were open to inspection, and which might have been discovered by a man of ordinary prudence and care. He was required to provide the track with such appliances as ordinary care and prudence suggested to avert danger and secure a reasonable safety to others coming upon or using said track at his invitation or request.

Therefore, if leaving the bank along the defendant's track, at the point where the accident happened, without any protection or guard, rendered it unsafe to riders and to race-horses over said track at that point, and unreasonably exposed said riders to danger of accident by reason of such condition of the bank, and if ordinary care, that is, such care as prudent men ordinarily employ in similar matters, required that the defendant should have provided some means by fencing along or otherwise guarding said point to prevent accident or injury, then his omission to provide some such means would be negligence on the part of the defendant.

Newby, Judge, in *Palen v. Thomas*, Highland County Common Pleas.

No. 504. Same continued — Defendant's negligence — How proximate cause of injury.—In order that the defendant's negligence may be said to be the proximate cause of the injury, the plaintiff is required to make it appear, by a preponderance of the evidence, that had the defendant exercised ordinary care in the construction and guarding of the track the accident would not have happened, and that the injury inflicted was the result of the defendant's carelessness in not guarding the defect complained of, and was an injury such as might have been foreseen and reasonably anticipated as likely to result from such carelessness. Therefore, if the horse which plaintiff was riding did not stumble against the bank, but was tipped or knocked down by another horse in the race, then the plaintiff can not recover, although the defendant may have been negligent in the manner above stated. The defendant was not the insurer of the plaintiff's safety, nor is he responsible for the negligence of other riders with the plaintiff in the race.

Newby, Judge, in *Palen v. Thomas*, Highland County.

No. 505. Same continued—Diligence required of plaintiff.—Although the defendant may have been guilty of neg-

ligence, still the plaintiff can not recover if he knew of, or had reasonable means of ascertaining, the defect complained of. The plaintiff was not allowed to shut his eyes to the circumstances and conditions surrounding him. But he will be charged with knowing whatever he would have discovered, as to the condition of the track, had he employed ordinary prudence and caution for that purpose.

The degree of diligence and care which the law required the plaintiff to exercise was such as one of his age and experience would ordinarily exercise under the circumstances, to look for and ascertain the dangers incident to his employment. And if the plaintiff saw, or by the exercise of such diligence could have discovered, the unprotected and exposed condition of the track before he was injured in it, and have avoided the injury, it was his duty to quit the employment. If he continued in the employment after knowing or being thus charged with a knowledge of the danger, he will be held to have assumed all the risk of such danger, and in such case he can not recover, although the defendant may have been negligent also.

Newby, Judge, in *Palen v. Thomas*, Highland County Common Pleas.

No. 506. Liability of county official for negligence.—The mere fact that the property-owner suffers damage as a result of the action of the officers or employees of the county, does not necessarily render the county responsible for the damage. You are no doubt aware that municipal corporations are liable for the wrongful and negligent acts of their officers or employees while acting in the course of their employment in the business of the corporation; but this rule has no application to counties. Municipal corporations are political bodies created and existing for the welfare and benefit of their immediate local inhabitants, while counties are political subjugations of the state, created on principles of general public policy, for the convenience of all citizens in the state, as distinguished from the citizens of a particular locality. The state being sovereign can not be sued, except in those cases where permission has been granted. A county being a division of the state, and part of the sovereign community, cannot be sued except as the state, through the medium of the laws enacted by the legislature, permits the county to be sued.

In the case of municipal corporations the law has provided that they may be sued and held for the carelessness and negligence of officers and employees, but in the case of counties the law does not permit such liability for carelessness, negli-

gence, or wrongful acts of the county officials or employees.

If, therefore, it is found that the plaintiffs have sustained damages which were caused solely by the negligence of the county commissioners or their servants, they cannot recover in this case against the county, but must proceed against the commissioners as individuals. The liability of the county only exists where the exercise of the legal powers of the county results in the invasion of the rights of individuals. If the injury resulted from the doing by the county and its officers and employees of something which the county had the legal right to do, and not from the negligence of the officers in doing the work, or by the negligent permission on their part to do something which they should have done, then there can be a recovery. If the damages resulted in the negligence in doing, or negligence in failing to do something, there can be no recovery.

Wright, Judge, in *County Commissioners v. Hahn*, Hamilton County Common Pleas.

The charge in this case was that the County Commissioners had deposited large quantities of earth, stone, and other materials upon the surface of the road and maintained the same, that they had wrongfully and unlawfully permitted the same to slide and precipitate itself upon the parties injured.

No. 507. Negligence—Injury charged to have resulted from lack of exercise of ordinary care in construction and use of appliances known as cooler in a furnace.—The plaintiff, by entering the employ of the defendant, took upon himself and assumed all the risks usually and ordinarily incident to the running and operation of a blast furnace, and for any accident resulting in injury to plaintiff while engaged in such employment the defendant would not be liable, unless it appears from a preponderance of the evidence in the case that such accident and injury was the direct and proximate result of the defendant's negligence in one or more of the particulars mentioned in the plaintiff's petition. The plaintiff in accepting the employment did not, however, assume risks and dangers of his employment which were concealed, unusual, and unknown to him. However hazardous you may find the business of operating blast furnaces to be, the law declares that persons entering the employ of persons engaged in operating them, and contracting to assist therein, assume all the risks ordinarily incident to such operation.

The mere fact that an explosion occurred and the plaintiff was thereby injured, does not raise any presumption of negligence on the part of the defendant. The existence of negligence is an affirmative fact, and the presumption is, until the

contrary appears from the evidence, that the plaintiff performed his duty, and that the defendant performed its duty. In view of such presumption, the burden rests upon the plaintiff to prove by a preponderance of the evidence that his injuries were caused by the fault, and were the direct and proximate result of the negligence of the defendant in some one or more of the particulars charged. The defendant, in placing and using the cooler underneath the iron notch, was bound to use ordinary care. The law does not presume negligence unless the plaintiff has shown by a preponderance of all the evidence on the subject that the defendant did not exercise ordinary care in choosing this appliance, and in causing it to be used in the place where it was used, the finding on this question would be in favor of the defendant.

The defendant did not guarantee to plaintiff that the appliance should be perfectly safe, but it was bound to use such diligence and care in the selection and use of the appliances as is usually exercised by ordinarily prudent persons engaged in the same or similar business. If, therefore, from the evidence you find that the appliance in question was in common use, and had been generally adopted by skillful and prudent men engaged in the same or similar business, and the defendant in good faith believed it to be a safe and proper appliance, then the defendant would not be guilty of negligence. Whether or not the appliance was in common use is a question of fact for you to determine. If you find it was not in common use, still it would not necessarily follow that the defendant was guilty of negligence, but it is a matter you may take into consideration, together with all the other evidence in the case, in determining the fact whether or not the defendant was guilty of negligence.

Knowledge of defendant of dangerous appliances.

If you should find that, on one or more occasions prior to the explosion, certain of defendant's employees expressed to the defendant's superintendent the opinion that the water-cooler in question was a dangerous appliance, as a matter of law, such expressions of opinion would not, in and of themselves, establish, or tend to establish, the claim that the appliance was in fact improper, dangerous, or unsafe. This does not preclude you from considering this evidence upon the other issues involved.

Gillmer, Judge, in *Burnett v. Andrews & Hitchcock Iron Co.*

No. 508. Injury from natural gas—Independent contractor—Rule of respondeat superior not applicable.—The defendant is a corporation—an artificial person—and can act

only through its authorized officers and agents, whose acts alone, within the scope of its authority, and whose negligence in the transaction of the business it authorized them to do, are in legal contemplation the acts and negligence of the corporation.

In respect to the liability of an employer for the negligence of an employee, whether agent, servant, or independent contractor, the law makes no distinction between natural persons and corporations.

The liability of one person for damages arising from the negligence of another, or the principle of *respondeat superior*, is confined in its application to the relation of master and servant, or principal and agent, and does not extend to cases of independent contracts not creating those relations, and where the employer does not retain control over the mode and manner of the performance of the work under the contract.

But where the employer retains control and direction over the mode and manner of doing the work, and an injury results from the negligence or misconduct of the contractor, or his servant or agent, the employer is placed under a liability equal and similar to that which exists in the ordinary case of principal and agent.

If the evidence shall show that the defendant and one J. G. entered into a contract, which was in writing except the acceptance thereof by the defendant, and that the same is in evidence, and that the work stipulated for in this written contract was performed by the said J. G. under said written contract, then the said J. G. was an independent contractor, for the said written contract does not show that the defendant retained control over the mode and manner of doing the work to be done by said contractor under said contract.

If the said J. G., as such independent contractor, was guilty of negligence in laying and constructing said mains and gas-pipes, or in leaving any one or more of said joints of said pipes or mains open, so as to allow the gas, when turned on, to escape therefrom, his negligence, as such independent contractor, can not be considered as the negligence of the defendant. To make the defendant liable for the negligence of the said J. G., contractor, the evidence must show that the defendant retained control over the mode and manner of doing the particular work, respecting the doing of which the said J. G. was negligent.

Although the defendant is not liable for the negligence of its independent contractor where it retained no control over the mode and manner of the performance of the work contracted for, yet it may be liable, if it was itself guilty of

negligence in allowing or permitting said natural gas to escape through a defectively laid or jointed gas-pipe or main. If, by the exercise of ordinary care and prudence, it could have discovered such defect, and it did not do so, it was guilty of negligence. It was not bound to know that such defect existed, but it was required to use ordinary care and prudence to prevent accidents and injuries to others, and whether it used that degree of care and prudence which men of ordinary care and prudence are accustomed to use under the same or similar circumstances, is a question for the jury to determine. If it did, it is not liable. But if it failed and neglected to use ordinary care, it was negligent, and, if its negligence was the proximate cause of the injury complained of, the plaintiff is entitled to recover, unless he has himself been guilty of contributory negligence.

From *Central Ohio Natural Gas and Fuel Co. v. Baker*, Supreme Court Affirmed. Evans, Judge, Franklin County Common Pleas.

No. 509. Injury from explosion of escaping natural gas through pipes and mains—Because of failure to close and calk pipes.—If the evidence shall fail to show by a preponderance that the defendant was guilty of negligence in either of said particulars, your verdict must be for the defendant. If, however, it shows by a preponderance thereof that the defendant was guilty of negligence in either of said alleged particulars, and that its negligence in that respect was the proximate cause of the injury complained of by the plaintiff in his petition, the defendant is liable.

If the evidence shall show that the gas escaped from one or more of the joints of the gas-pipe or main, and that it caused an explosion and an injury to the plaintiff, such facts alone do not raise any presumption, nor do they tend to prove that the defendant was guilty of negligence, and before you can find that it was, the evidence must show that it failed and neglected to use and employ that degree of care and prudence which persons of ordinary care and prudence are accustomed to use and employ under the same circumstances. If it used such degree of care, it is not guilty of negligence. But if it failed to use such care, it was guilty of negligence.

From *Central Ohio Natural Gas and Fuel Co. v. Baker*, Supreme Court Affirmed. By Evans, Judge, Franklin Common Pleas.

No. 510 Injury from explosion of boiler.—If the plaintiff was without fault on his part, and was injured by the explosion of a boiler operated by the defendants, or their servant or agent, the mere fact of such explosion raises a

presumption of negligence on the part of the defendants. This presumption is only *prima facie*, however, and not conclusive; that is, the plaintiff will be entitled to recover on such presumption, unless the defendants, by a preponderance of evidence, show that they exercised ordinary care and prudence, that is, such care and prudence as is ordinarily exercised by men of ordinary prudence under like circumstances. It was the duty of the defendants to furnish a competent engineer to run said engine and boiler, and if the plaintiff was injured by reason of the incompetency of the engineer, the plaintiff can recover, if he was without fault himself. If you find from the evidence that plaintiff's injury was caused by the explosion of the steam boiler operated by and belonging to the defendants, they must show by preponderance of proof the competency of their engineer. If, however, it be shown that the defendants' engineer was competent, yet if he, by any carelessness or neglect on his part, caused the explosion and injured plaintiff, he can recover, if plaintiff was without fault on his part. The engineer must not only have been competent, but he must not have failed to exercise his competency with proper care and skill. Was there any want of care on the part of the engineer in the management of said boiler at the time of said explosion? In determining this you will inquire was there a lack of water in the boiler, and what was the pressure of steam in the boiler at the time, and whether it was excessive. Of course, if the plaintiff was himself acting as engineer at the time, and neglected to exercise due and ordinary care, he can not recover. It was also the duty of the defendants to furnish machinery reasonably proper and fit for the purpose for which it was used. If there was any defect in the engine or boiler which the defendants knew of, or of which they might have known by the exercise of reasonable care and diligence, and the plaintiff was injured by reason of such defect, he will be entitled to recover. This does not, however, relate to the lack of power in the engine to operate the said mill.

From *Huff v. Austin*, Supreme Court. Affirmed. Price, Judge, Logan County.

(10) In Mines and Mining.

No. 511. Duty of operator of coal-mine to prop mines—Liabilities for failure.—Our statute provides that "the owner, agent, or operator of every coal-mine shall keep a supply of timber constantly on hand, and shall deliver the same to the working-place of the miner, and no miner shall be held responsible for accidents where the provisions of this section have not been complied with by the owner, agent, or operator thereof." And said section imposes the duty upon "any miner or other person employed in any mine governed by the statute, who intentionally and willfully neglects or refuses to securely prop the roof of any working-place under his control," on penalty of fine and imprisonment.

It, therefore, was the duty of the defendant to furnish such timber for props or support for such roof to the working-place of the miner, and if it failed so to do, and said W. P. came to his death by reason of such failure, then the defendant has been guilty of such negligence as will authorize a recovery, unless the deceased brought the same upon himself by his own improper conduct.

(a) *Dangerous employment.*

The law is that persons employing men in dangerous business or avocations shall use due and reasonable diligence in providing safe machinery and appliances, and so far as they can, by reasonable care, avoid exposing them to extra risks.

And the law also is that, where persons engage in work such as the deceased was engaged in at defendant's mine, at —, they assume the necessary and ordinary risks incident to the nature of such employment. "In the absence of a contract, the master is not in any case the insurer of the safety of his servant," and the servant, by the terms of his employment, is presumed to assume the risk of such injuries from accident as are incident to the nature and character of the employment, and against which the master could not, in the exercise of ordinary care, have protected him.

(b) *Touching the question of "the working-place of the miner," where the timber should have been delivered.*

It is for the jury to say under all the evidence where that was in this case, whether at the jaw of said room, as claimed by defendant, or at the point where deceased was at work when he was killed; if, on this whole evidence, you find that

it was at the jaw of said room, and further find that sufficient props were there, then your inquiry is at an end, and your verdict should be for the defendant. But, on the contrary, if you should find from the evidence that "the working-place of the miner" was not at the jaw of said room, but was at the place where the deceased was at work, and should also find from the evidence that no timber for support was there, or even though you find from the evidence that said "working-place" was at the jaw of said room, and further find that props with which to support said roof were not at or near said jaw, then and in case you find that they had not been, and he continued on and said roof fell and killed him, then and in that case the jury would be justified in finding for the plaintiff.

Huffman, Judge, in *Upton Coal Co. v. Peterson*, Perry County. Affirming judgments of both lower courts.

No. 512. Injury in coal-mine—Through negligence of foreman—Instruction as to relation of foreman and miner and as to duties of foreman.—If plaintiff and F. at the time of the accident resulting in the wrong complained of were fellow-servants, then, as a general rule, he who engages in the employment of another for the performance of special duties and services for compensation, takes upon himself the ordinary risks and perils incident to the performance of such services. The negligence complained of is that of W. L., who it is claimed was a foreman in the mine of defendant, and as such was clothed with authority over F. and the plaintiff. In determining whether or not L. was guilty of negligence, the jury is to bear in mind that negligence can not be presumed, but that it must be proven by a preponderance of the testimony; that to prove negligence it is not sufficient to show that an accident happened which resulted in injury to plaintiff, and that the question is not whether an accident could have been avoided, but whether L. was reckless or negligent in failing to provide against it. The law does not require that he should have acted with the greatest care and foresight, but that he should have acted with the same prudence that an ordinarily prudent man would exercise under the same circumstances, and in determining this, you are to look at the conditions as they were at the time—at the rib, or partition wall of coal, as it then appeared and not as the event determined it to be. L. was bound to take not extraordinary, but usual precautions against danger to the employees in said bank, commensurate with the kind and character of employment they were engaged in, and if he knew or ought to have

known the thickness of this rib, then it was his duty to make use of his knowledge in preference to relying on appearances.

J. G. Huffman, Judge, in *Jones v. Tague*, Supreme Court. Judgments affirmed.

No. 513. Same continued—Foreman directing miner to mine coal off the rib—Where it is charged that rib is too thin so as to render it dangerous.—It is the negligence complained of in the petition that you are to confine your investigations to, and that is charged to be the negligence of L. (if he is shown to be the vice-principal, general superintendent and manager of defendant, and the superior of plaintiff and F.) in directing P. F. to mine coal off the rib between M.'s entry and K.'s entry and opposite to the place where plaintiff was working, it being alleged that said rib was thin and the mining by F. at that place necessarily dangerous to plaintiff working in his room in the M. entry. If it appear by a preponderance of all the testimony that W. L. was the vice-principal or managing agent of defendant, authorized to direct the employees in the Beech Grove Mine where they should work; that he directed P. F. to mine at that rib opposite the place where plaintiff was working; that the rib at that place was so thin, or otherwise of such character that the mining and blasting of coal there was unsafe and dangerous to those laboring where plaintiff was then working; and if said L. did not act with reasonable skill or prudence in such direction under the conditions as they then existed, and if, as the natural result thereof, plaintiff was injured, then the defendant is responsible.

If, however, that rib was not so thin or of such character as to make its mining in the usual way dangerous to T., or if it were dangerous, but L. acted with reasonable skill, caution, and prudence in directing said F. as aforesaid, looking to the means of knowledge he then had, then the defendant would not be responsible.

J. G. Huffman, Judge, in *Jones v. Tague*, Supreme Court. Judgments affirmed.

No. 514. Same continued—Whether damage was natural result of direction of foreman.—And if it should appear from a preponderance of the testimony that the blowing of the coal into the M. entry and in and upon plaintiff, to his damage and injury, were not the natural and reasonable result of the direction given to F. by L., but were due to the unskillful, imprudent or improper mining by the said F. and which could have been avoided by the use of reasonable skill

and care by F, then the defendant is not responsible and your verdict should be for him, unless L, also, directed the manner of mining or blowing said blast by F, as aforesaid, in which event your verdict should be for the plaintiff.

From same as ante, No. 500, note.

No. 515. Same continued—Must be result of careless act of foreman and not fellow-servant.—As already intimated, “where a servant is injured in his person through the carelessness of a fellow-servant engaged in a common business and employment, and no relation of subordination existed between them, and the employer is himself guilty of no fault, such employer is not responsible for such injury.” So in the case at bar, if the plaintiff was injured by the careless acts of his fellow-servant, F., and neither the defendant nor his agent, L., are guilty of any fault which led to the injury of plaintiff, then and in that case, the defendant is not liable; but if you should find from the weight of the evidence that the defendant or L., in any manner contributed to the wrong complained of, then and in that case your verdict should be in plaintiff’s favor, and in this connection it may be stated that “one working a coal-mine is not bound as to his employees to take precaution against all possible dangers. His duty is performed by guarding them against those reasonably probable.”

Id.

No. 516. Same continued—Anticipation and provision against occurrence.—The proper inquiry is not whether the accident might have been avoided, if the one charged with negligence had anticipated its occurrence, but whether taking the circumstances as they then existed he was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury to individuals nor of any particular means which it may appear after the accident would have avoided it. The requirement is only to use such reasonable precaution to prevent accidents as would have been adopted by prudent persons prior to the accident.

Id.

No. 517. Same continued—Negligence measured by conditions known to exist.—In an action for injury occasioned by the alleged negligence of the defendant, the negligence, if any, is to be measured by the condition of things at the place where the accident took place, as they were known to

exist by each of the parties at the time the acts are complained of as being negligent, irrespective of subsequent determination of conditions unknown at the time to both, or to either, except in so far as that knowledge may properly affect the one so injured.

Where the substance of the wrong complained of was that the defendant did not act with due foresight, the right of action depends primarily upon so fixing the relation of the parties as to show the defendant's obligation and upon showing further that the harm and injury complained of were such as a reasonable man in the defendant's place should have foreseen and provided against.

J. G. Huffman, Judge, in *Jones v. Tague*, Supreme Court, No. 4090. Judgments of both lower courts affirmed March 5, 1895.

No. 518. Statutory duty of mine-operator to keep supply of timber—And duty of miner to prop working-place.—By the Statute Law in this State it is made the duty of every owner and operator of a coal-mine employing more than ten men in his mine to keep a supply of timber constantly on hand and to deliver the same to the working-place of the miner. The same law also makes it the duty of any miner employed in any mine in which more than ten men are engaged to securely prop the roof of any working-place under his control, and further, it is by the law the duty of the miner to obey any order given by the superintendent of a mine in relation to the security of the mine in the part thereof where the miner is at work and for fifteen feet back from the face of the working-place.¹

Bearing in mind then that the defendant was not the insurer or grantor of W. P. from the ordinary risks and hazards of his service with the defendant, nor for the extraordinary and unusual risks that arose in his service with which he became acquainted, unless he had notified his employer of such extraordinary and unusual hazards and his employer had promised to remedy them, and bearing in mind that the defendant can only be held liable for the alleged breach of its duties as employer to P. set forth in the plaintiff's petition, you will inquire whether it is established by the greater weight of the evidence that the roof of the room No. 8 wherein P. is alleged to have worked was in the unsafe, dangerous and unstable condition alleged in the plaintiff's petition, and if so, whether it is established by the same degree of proof that the defendant knew of its condition in those respects. If you find such to be the facts, then it is admitted

¹ R. S., Sec. 6871.

that W. P. prior to and at the time of his injury knew the condition of the room in those respects.

Ordinarily a servant who has been injured by the negligent act of his employer can not recover, if he, the servant, has been in fault and thereby contributed at the time to his injury. Such principle of law would apply to P. in such a case if he had been injured and not killed and brought the action to recover for his injuries.²

² R. de Steiguer, Judge, in *C. & O. Coal & Coke Co. v. Preston*. Judgments affirmed by Supreme Court.

No. 519. Same continued—Knowledge of dangerous condition of room—Continuation in work—Notice to employer—Promise to repair.—The plaintiff can not recover in this action if he, P., had known of the alleged dangerous condition of the room and continued to work therein without objection or complaint to his employer, the defendant; of the dangerous condition of his room and the need of posts to remedy it, unless his employer had then promised to furnish the posts for such purpose, and P. had continued to work in the room, relying upon the promise of his employer, and was injured before the posts had been furnished, and before reasonable time had elapsed for their being furnished. If you find, however, not only that the room in which he worked was in the alleged dangerous and unstable condition set forth in the petition, and that the defendant had knowledge thereof, and that P. made complaint to his employer, and that his employer, the defendant, thereupon promised to supply him with posts to post the room so as to render it safe for the performance of his services, and that P. relied on such promises and was thereby induced to, and did continue to, work in the room, and that, before a reasonable time had elapsed for the defendant to furnish the posts, the roof of the room fell in in consequence of the want of posts and killed P., then the fault of his continuing to work in his room, with such knowledge of its dangerous condition, would not prevent the plaintiff from recovering. And if you should find, in addition to the facts that I have named, that it was also established in evidence that he left a widow and next of kin, as alleged in the plaintiff's petition, and it did not appear that P. was guilty of fault or negligence in any other respect than continuing to work in the room in its alleged dangerous condition, in reliance upon such promise to furnish the posts, then the plaintiff would be entitled to a verdict in her favor, and you would have to assess her damages.

If, however, the defendant did fail to furnish the posts,

and P. continued to work in the room for a longer period than was reasonably necessary to enable the defendant to furnish the posts, and P. was killed after such reasonable time had elapsed, then the plaintiff can not recover.

I repeat, to find a verdict for the plaintiff you must find that the room in which W. P. mined was in the unusually unsafe, unstable, and dangerous condition alleged in the plaintiff's petition, that the defendant had knowledge of its condition in those respects, and the plaintiff notified the defendant of the need of posts to post the room and render it ordinarily safe, and that the defendant promised to furnish the posts to him, that P. relied on such promise to supply him with posts, and in such reliance continued to work in the room, and that, before the defendant had supplied him with the posts at his working-place, and before a reasonable time had elapsed for the defendant to supply the posts, and while in the line of his duty, the roof of the room fell in for want of the posts, causing the death of P., and that he left a widow and next of kin as alleged in the petition. These facts being established in evidence, and it not appearing that P. was in fault in any other respects contributing to his injury at the time, except so far as continuing in the mining-room after such posts had been promised him, on a promise of defendant to supply posts, then the plaintiff would be entitled to a verdict.

R. de Steiguer, Judge, in *The Chicago & Ohio Coal & Car Co. v. Preston*, Supreme Court, No. 4318. Athens County. Judgments affirmed.

(11) Measure of Damage.

No. 520. Measure of damages in personal injury—Medical attendance—Interest.—If you find that the plaintiff is entitled to recover, your verdict should be in his favor, and it should be in such an amount as will fully compensate him for the injuries which he has actually sustained, directly resulting from the negligence and want of care on the part of the defendant. This compensation would include the pain that he has already suffered, as well as the pain he will continue to suffer, if his injuries are of such a character as to cause him pain in the future. The time that he has actually lost by reason of his injuries, and the loss that may accrue to him by reason of his diminished capacity to earn money in the future, if you find his injuries are such as to diminish his capacity to earn money in the future.

In addition to this he would be entitled to recover, if you find in his favor, for expenses actually and necessarily incurred by him in this case by way of medical attendance and nursing, and which have been proven to have been thus expended; and you may also take into consideration any further expense which will naturally and necessarily be incurred by him by reason of his injuries, if you find that his injuries are of such a character as to require such expenses and outlay upon his part.

You may also take into consideration the length of time that has elapsed from the time that the plaintiff received his injuries until the present, not as interest, nor by way of interest, but simply as a part of the compensation to which the plaintiff would be entitled in order to make him whole, if you find he is entitled to recover.

From *P. & L. E. R. R. Co. v. Munich*, Sup. Ct. 4063.

Another briefer form.

If you find that the defendant is liable, you will award to the plaintiff such sum as damages as will fairly and justly compensate him for the injury; the measure of his damages is compensation and only compensation. You will take into consideration the nature of the injury, the extent of it, the pain which he has suffered, all the expenses which he has necessarily been put to in consequence of the injury. You will consider the effect of the injury, the permanency of it; the effect of the injury upon his bodily strength and upon his capacity to labor and earn a living, and all the circumstances, calmly and deliberately, and apply your judgment to the evidence in the case. If you find in favor of the plaintiff, as I have said, you will award to him such damages as will fairly and justly compensate him for the injury.

No. 521. Damages for injury to minor in suit by next friend.—[Continuing from last No. 520]. But the father is entitled to the services and earnings of his minor son, until he becomes twenty-one years of age, and may bring an action in his own name against the defendant to recover such damages as he may have sustained in consequence of its alleged negligence; and therefore you can not allow the plaintiff (a next friend) any damages for any of his time that has been lost, or which may be lost in consequence of said injury before he reaches the age of twenty-one years.

Evans, Judge, in *Cent. Nat. Gas & Fuel Co. v. Baker*.

No. 522. Damages—For death—Widow and children as beneficiaries.—This case is brought by the administratrix of A. B. C., deceased, for the benefit of his widow and four children, named in the complaint, to recover damages for the pecuniary injury that you may find to have resulted to them by reason of his death, and the amount of the damages are to be determined by the proofs in the case, and they must be a fair and just compensation to the widow and children for the pecuniary injury resulting to them from the death of C., and the damages are confined to pecuniary injuries resulting from his death. You can assess no damages on account of bereavement arising from the death of A. B. C., nor for any mental suffering or anguish arising to the widow and children on that account, nor to solace them on account of such death. You are confined, in assessing the damages, to the pecuniary injury resulting from his death, and you can not assess any damages by way of punishment to the defendant, nor way of making example of the defendant, for any wrong it may have done in your estimation. You have a right in making your estimation of the damages, if you so do, to look to the pecuniary benefit that the wife and children would probably have derived from A. B. C., if he had not lost his life, and in assessing such damages you may look to the manner of man that A. B. C. was, his occupation and ability to earn money and to acquire property, his age, health, and probable duration of life, in case he had not lost it, as alleged, and what he would probably have devoted to his wife and four children, had he continued to live.

R. de Steigner, Judge, in *Cook v. C. H. V. & T. Ry.*, 51 O. S. 636. Lower court was reversed by Circuit Court on question of contributory negligence of deceased, and this was affirmed by the Supreme Court.

No. 523. Measure of damages for death of husband to wife and children.—The measure of damages in this action is the pecuniary injury only, the money value of the deceased to his wife and children. This is the law. The jury can not consider their bereavement, or the mental or bodily suffering of either deceased or his family. Nor can you allow anything by the way of exemplary damages. The sole question of the jury as to damages is what actual pecuniary loss has the family of the deceased, named in the petition, sustained by his death; and in coming to a conclusion in this regard, the jury may consider the habits of deceased at the time of his death, whether or not he was an industrious man, his physical condition, his capability of earning money, the manner in which he provided for his family, his expectancy of life, and such

other circumstances presented by the evidence as will aid you in coming to a correct conclusion. The plaintiff must make out his case by a preponderance of the evidence. By preponderance of evidence is meant the best evidence—the evidence that most readily convinces—and not necessarily the testimony of the greatest number of witnesses.

If plaintiff is entitled to recover he would be entitled to interest on whatever sum you may find in his favor from —, 18—, up to this date, but he would not be entitled to recover in interest and principal together a sum over ten thousand dollars.

No. 524. Measure of damages for death caused by negligence.—Now, gentlemen, under the rules of law which I have given you, give this case the careful consideration which it deserves, as do all other cases which are brought before juries for consideration, and determine whether the plaintiff has fairly established the charge that is made here, of negligence resulting in M.'s death. If you find that she has, then she would be entitled to recover in this action for such pecuniary damage as the evidence shows to have resulted to the next of kin of Mr. M. by reason of his death.

Nothing can be recovered in this action by way of solace to this widow, who has been deprived of her husband, for sorrow or mental anguish which would result from that to her. It is purely a question for you, if you reach the question of damages, as to the pecuniary damage which has been sustained. And should you reach that point in your deliberations, in fixing the amount of damage which has been sustained by the death of M., you may fairly take into consideration such facts as the evidence disclose as to M.'s age, his health, his habits of industry, and all those facts which bear upon the question as to what his life in dollars and cents was probably worth to his next of kin, and that sum would represent the damage that the plaintiff would be entitled to recover in this case, if you find that the negligence has been proven as alleged, and that such negligence caused the death of M.

Wm. B. Sanders, Judge, in *L. S. & M. S. Ry. v. Matthews*, 51 O. S. 565.

No. 525. Damages for death of a young man.—I made no reference to the question of damages, gentlemen of the jury, I suppose, because it is rather hard to give you a basis upon which you may estimate them, if you reach the conclusion that the facts upon which the plaintiff relies, and is entitled to recover have been established by a preponderance of

the evidence. The damages must be in a sense speculative. You are to estimate what, by a fair judgment, would be a pecuniary compensation to the mother and sisters and brothers for the pecuniary loss which they have sustained by reason of the death of the plaintiff's intestate. It is only the pecuniary loss which they have sustained. You are to reach that by taking into consideration the age of the young man, his earning capacity, his probability of life, and to include in your verdict such amount as you think the mother, brothers and sisters would have received from this young man if he had continued to live, and had not been killed in the way in which it has been described to you. This calls for the exercise of a fair judgment and discretion. You may include in the verdict any reasonable probability of the accumulation of any money by this young man if he had lived, and the benefit from such accumulation, if he had died, to the persons for whose benefit this action is brought.

Wm. H. Taft, Judge, in *C. H. & D. R. R. v. Kassen*, Supreme Court, No. 1545.

No. 526. Damages recoverable for death of child eleven years old for parents.—You will assess such damages in that case as in your judgment the plaintiff ought to recover, limited, however, by the instructions herein given. This discretion the court feels should be exercised in a reasonable manner. It must be an honest, intelligent discretion, guided by the facts that are given to you in evidence. This amount of damages, within the limits of the law, and which is fixed by the statute not to exceed ten thousand dollars, is to be ascertained from the evidence submitted to you. It should be a fair and just compensation, proportionate to the peculiar injury resulting to the father and mother from such death; and in determining this, the reasonable expectations of what the beneficiaries might have received from the deceased had she lived is the proper subject for your instruction;¹ but no damages can be given on account of bereavement, mental suffering, or as a solace on account of such death.² This compensation can be considered by you only as a hard cash transaction. In determining this compensation, the intelligence, health, and age of the deceased, or her capacity for services or wage-earning, and the reasonable expectation of what the father and mother might have received from the deceased had she lived, the age of the parents, and the reasonable expectancy of their lives, considering their ages, health,

¹ *Grotenkempfer v. Harris*, 25 O. S. 510.

² *Davis v. Guarnieri*, 45 O. S. 478-9.

and uncertainty of human life, may be considered by you as shown by the evidence, which evidence must guide you.³

³ Voris, Judge, in *Gaston v. Lake Shore R. R. Co.*, Lorain County Common Pleas.

No. 527. Duty of injured person to care for himself—Employment of physician as affecting measure of damages.—“If the plaintiff is entitled to recover any damages, he is entitled to recover an amount sufficient to compensate him for the injury which he has actually sustained, so far as the damages to him naturally and directly flowed from and were caused by his wounds, bruises, or other injuries caused by defendant’s acts of negligence complained of. After the plaintiff was injured he was bound to use ordinary care and prudence, under all the circumstances, to take care of himself and his wounds; and if he employed a physician of good standing and reputation, supposing and having reason to think he was such, and who, in fact, was such, then, though the physician may not have used all of the approved remedies, or that remedy which would have been most suitable in the case, or which a good medical man would have used under the circumstances, and on account of the failure to use such usual or proper remedies his condition is worse than it would be had it been used, still plaintiff may recover for his actual damages, if he himself has not been negligent, and such treatment or failure to use such remedy merely will not prevent plaintiff from recovering the full extent of his injuries as aforesaid.”

From *Loeser v. Humphrey*, 41 O. S. 378.

No. 528. Measure of damages for personal injury—Special defense on account of physical condition, etc.—After the usual instructions as to the general rules governing the measure of damages for personal injury, which are the same in all cases, and are given elsewhere, the following instructions will fit the special case where the defendant claims that the measure of damages shall not be so great on account of the previous physical condition of the plaintiff.

“While it is no defense to say that the person was of susceptible nervous diathesis, or of infirm health, and liable to break down from nervous exhaustion or other causes, and not able to perform ordinary labor, yet these circumstances as you find them to be may be and should be considered by you in determining what compensation ought to be awarded, if any, by reason of future impaired ability to earn wages (or perform labor) or engage in any profitable employment,

as bearing upon the question of the length of time the plaintiff may or may not continue to be disabled, and the probable duration of his (or her) life.

But for whatever impairment he (or she) has so sustained, or will sustain, and caused by said wrongful acts of the defendant, he (or she) is entitled to be compensated, so far as you can reasonably ascertain from the evidence. You may consider also what effect, if any, the fact that the plaintiff continued in her occupation after the injury had upon her physical condition. You are instructed that for any suffering or impairment caused or sustained by reason thereof she can not recover, if by reasonable care and prudence under all the circumstances, and the surrounding circumstances should be considered by you in determining whether she exercised reasonable care and prudence, she would have avoided them. The defendant can not be charged with the consequences of the want of reasonable care and prudence of the plaintiff that caused her suffering or impairment that otherwise she would not have endured.

But you are instructed, however, that it is not sufficient to defeat her action that she thereby only aggravated the injury caused by the negligence of the defendant.

Voris, Judge, in *Dussel v. Akron St. R. R. Co.*, Summit County Common Pleas. Affirmed by Circuit and Supreme Court.

As to damages for personal injury when the person's health is impaired at the time of injury, see 10 Am. St. Rep. 65.

No. 529. Same continued—Amount of compensation.—

As to the amount of compensation, the court can give you no further assistance. The law has wisely left that to the intelligence, candor, and impartial judgment of twelve jurors. Neither should your prejudices or sympathies in the least affect that judgment. What does a fair consideration of the evidence say that impartial justice demands?

It is the pride of our jurisprudence that justice is administered impartially. The law loves candid justice, and is no respecter of persons. The rich and poor, the weak and influential, are alike entitled to its protection. You are the exponents of that sense of justice.

Voris, Judge, in *Dussel v. Akron St. R. R. Co.*, Summit County Common Pleas. Affirmed by Circuit and Supreme Court.

No. 530. Damages recoverable by husband for injury to wife—In personal injury.—You should not include any damages that resulted to the husband of the plaintiff for any injuries to the person of his wife, for her physical suffering, or her mental anguish, such as constitute a violation of her personal rights, for anything which she may have lost in her

wages, or her ability to earn wages, or as a wage-earner for other persons, but not in the domestic services of the plaintiff in his family or household affairs, or to her own separate property or means. But for all these the law gives her a remedy in her own right, and for which the husband may not recover. But he may recover in this action for any damages he may have sustained by reason of the impaired ability of his wife caused by said acts of negligence, if any you find from the evidence, to perform her usual domestic services in and about his family and household, for such services as she was able and usually contributed "to his pursuit of gardening in connection with her household duties, and in selling and marketing said products," taking into account the loss of time, the extent and probable duration of any impaired ability which you may find from the evidence, if any, for any loss of the society and comfort of his wife, and for any expenses reasonably incurred for surgical and medical attendance and nursing, incurred in his own behalf, or for his said wife, and for damages to the vehicles as you find the facts to be from the evidence.

Voris, Judge, in *Cranmer v. Akron St. Ry. Co.*, Summit County Common Pleas. See *London v. Cunningham*, 20 N. Y. S. 22 Am. St. Rep. 800.

No. 531. Damages resulting to husband and children for death of wife, etc.—Measure of.—"The plaintiff's damages, if any, should be a fair and just compensation for the pecuniary injury resulting to the husband and children from the death of the wife. In no case can the jury consider the bereavement, mental anguish, or pain suffered by the living for the dead. The damage is exclusively for a pecuniary loss, not a solace. The reasonable expectation of what the husband and children might have received from the deceased, had she lived, is a proper subject for the consideration of the jury, if they find for the plaintiff. What the husband and children might reasonably expect to receive by reason of the services of this woman in a pecuniary point of view is to be taken into account in determining the amount of damages, if you find for the plaintiff. It should be said that it is the present worth as a gross sum in money, for the loss of the services of the wife, that you are to find, if you find a loss. It is that same which put in money is a compensation for what you find this woman would reasonably have saved for her family. Of course, in determining this, these things are all to be considered; that is, the age, health, probability of length of life, or death if she had not died from taking this drug."

From *Davis v. Guarnieri*, 45 O. S. 470.

(12) Street Railways.

No. 532. Duty of street railway company as carrier to its passengers.—As a matter of public policy, the law requires a strict performance of the obligations assumed by a street railway company in its capacity as a common carrier to those taking passage on its cars. In accepting the passenger for transportation, the defendant can not be heard to say that it is not liable for the injuries caused to the passenger by its performance, while the relation exists, unless it has exercised, under all the circumstances, that degree of care and prudence in its management, and in the instrumentalities employed by it, that prudent men in like circumstances usually employ, and commensurate with the hazards ordinarily to be encountered. The rule requires that it should do everything necessary to secure the safety of its passengers, reasonably consistent with the business and means of conveyance employed in street railway carriage.

The law requires the utmost care and skill which prudent men are accustomed to use under similar circumstances,¹ but the rule is not to be pressed to an extent which would make the conduct of the business so expensive as to be wholly impracticable. But the common carrier must do all that any one in his position could reasonably do to guard against injury to his passenger, and to provide such facilities and instrumentalities as are required for the safe and prudent carriage of passengers for pay. In the absence of knowledge to the contrary, if the plaintiff acted in good faith, she was entitled to presume that the defendant would not be negligent in the performance of its whole duty to her, and that she would not be exposed to any hazard that reasonable care and prudence could fairly guard against.²

¹ 7 W. L. B. 137.

² *Voris, Judge, in Dussel v. Akron St. R. R. Co., Summit County Common Pleas.* Affirmed by Circuit and Supreme Court.

Street railway is a common carrier. Booth on St. Rys., Sec. 324.

No. 533. Street railroad—Liabilities to its passengers—Rights of passengers.—The acceptance of a person as a passenger, and the reception of the usual fare would constitute the relation of carrier and passenger, so that he could not be ejected from the cars of the defendant against his will during the passage for which payment had been made, except for improper conduct on his part.

The passenger rightfully pursuing his ride on the cars of the defendant is entitled to be treated with courtesy, and may not be treated rudely or be subjected to insult by the employees and agents of the company managing the cars, without incurring liability therefor.

In general, the passenger carrier is bound by the acts of the employees and agents in the scope of their employment, and must answer for their negligence, unskillful, or wrongful performance in the scope of such employment. In other words, the negligence or improper conduct of the conductors and other employees of the company managing the cars, in the scope of their employment, is the negligence and wrongful acts of the company, for which it may be held liable.

Steffee v. The Akron St. R. R. Co., Summit County Common Pleas. Voris, Judge. Duties of street railway to its passengers. Booth St. Ry., Secs. 327, 326, 328. In Ohio the utmost degree of care and skill is required. 7 W. L. B. 187; 6 O. C. C. 155.

No. 534. Street railways—Relation of passenger—Created when.—The acceptance of a person as a passenger, and the reception of the usual fare, would constitute the relation of carrier and passenger (*Booth on St. Rys., Sec. 326*), so that he could not be ejected from the cars of the defendant company against his will during the passage for which payment had been made, except for improper conduct on his part. A passenger rightfully pursuing his right on the cars of the defendant is entitled to be treated courteously, and may not be treated rudely, or be subjected to insult by the employees and agents of the company managing the cars, without incurring liability therefor.

From Steffee v. The Akron Street Railroad Co., Summit County Common Pleas. Voris, Judge.

"The existence of the relation depends largely upon the intention of the party at the time he enters, or while attempting to enter." *Booth, Sec. 326. He is a passenger while in the act of getting in the car. 32 Minn. 1; 137 Mass. 210. The relation ceases when the passenger steps from a car upon the highway. 139 Mass. 542; 31 N. E. 391.*

No. 535. Street railroad company—Duty to public in use of street.—The street railroad company in the use of the street owes to the public using the street the duty to carefully and prudently exercise its right of running its cars on the street, so that it does not injure others; but it is required to exercise no higher degree of care than that required of the plaintiff, and that which the circumstances reasonably require, but this care must be commensurate with the hazards ordinarily attending the operation of its cars upon the public streets of the city.

The privileges granted to the railroad company to lay down its tracks and operate its cars are upon an implied condition that they will be used with due regard to the rights of the public in the highway, and that it will not be guilty of negligence, nor is the use of the street by the public for the purpose of traveling in the ordinary mode, an invasion of the rights of the persons operating the street railway. The public still retains the right to make ordinary use of the street, not inconsistent with a reasonable and prudent operation of the defendant's cars, and the railway company holds its privileges on an implied condition that the rights of the public shall not be unnecessarily impaired or lessened.

It is the duty of the defendant company to exercise ordinary care and diligence to prevent injury to persons lawfully traveling in the street occupied by its tracks. It is bound to know that the public may use the entire street when not in actual use by its cars, and it must employ reasonable means to prevent injury to those whom it knows or ought to know may rightfully so use the street. This knowledge requires that it shall exercise due care and diligence to make it reasonably safe to travel on the highway in the ordinary mode.

Voris, Judge, in *Cranmer v. Akron St. Ry. Co.*, Summit County Common Pleas. Booth on St. Rys., Sec. 303.

No. 536. Transportation upon street railroad embraces what.—The transportation of a person upon a street railroad or cable railroad embraces not only the carrying of the passenger, but the receiving and the discharging of the passenger; and the ordinary care that the railroad company owes to the passenger is just such ordinary care as is to be applied to the carrying, receiving, and discharging of the passenger from its train under the circumstances of each case.

No. 537. Duties to passengers.—The defendant was not the insurer of the safety of the plaintiff in taking passage upon its car, but by accepting him as a passenger it bound itself to provide him with a safe transportation to the place of destination, and not to expose him to any hazards that reasonable care and prudence could prevent; and in taking passage upon the car he took upon himself the hazards incident to passenger transportation upon the defendant's car, when properly managed only; this would include getting on and off the cars.

As matter of public policy, the law requires a strict performance of the obligation assumed by the public carrier, to

those taking passage upon its cars. The defendant can not be heard to say that it is not liable for the injury caused to the passenger by its performance, while the obligation exists, unless it has exercised under the circumstances that degree of care and prudence in its management that prudent men in like circumstances usually employ, and commensurate with the hazards ordinarily to be encountered. The rule requires that it should do everything necessary to secure the safety of its passengers, reasonably consistent with the means and business of the conveyance employed in street railway carriage. The common carrier must do all that anyone in the position could reasonably do to guard against injury to its passengers and to provide such facilities as are required for the safe and prudent carriage of passengers for pay.

Voris, Judge, in *Sourek v. The Akron St. Ry. Co.*, Summit County Common Pleas. Booth on St. Rys., Sec. 328.

No. 538. Bound by acts of agents—Conductor and motorman.—In general the passenger carrier is bound by the acts of its employees and agents in the scope of their employment, and must answer for their negligent or wrongful performance in the scope of their employment. In other words, the negligence of the conductor and motorman of this car, in the scope of their employment, would be the negligence of the defendant company, for which the defendant would be liable, if you find that they, or either of them, were negligent in the performance of their duties as such employees and agents of the defendant, in respect to the negligence charged.

Voris, Judge, in *Sourek v. The Akron St. Ry. Co.*, Summit Common Pleas. Booth on St. Rys., Sec. 372.

No. 539. Duty to stop cars at usual stopping-places for passengers.—It was also the duty of the defendant to stop its cars at its usual stopping-places to take on passengers, and for such reasonable time as to give them reasonable opportunity to get aboard, so as not to endanger the safety of the passenger; but where the cars are signaled to stop at other than regular stopping-places, the plaintiff would not be justified in attempting to get on the car, until it had fully stopped, unless the plaintiff was reasonably misled into the belief by the concurring conduct of the defendant that it would be safe for him under the circumstances to get on board the car while so in motion.

Voris, Judge, in *Sourek v. St. Ry. Co.*, Summit County Common Pleas. Booth on St. Rys. 347. See 128 N. Y. 583; 12 N. Y. S. 930.

No. 540. Stopping car for passengers to alight.—The court can not say to you as a matter of law how long the car of the defendant should have stopped when plaintiff alighted; but whether the car did stop, or whether it stopped long enough for plaintiff to alight with safety, are matters of fact for you to determine under all the circumstances of the case given you in the evidence. We do, however, say to you that the car ought to have been stopped long enough to give the plaintiff reasonable opportunity to alight in safety.

Voris, Judge, in *Dussel v. Akron St. R. R. Co.*, Summit County Common Pleas. Affirmed by Circuit and Supreme Court.
Booth on St. Rys., Sec. 347.

No. 541. Alighting from street-car—Assistance of conductor—Ordinance requiring.—What actual assistance, beyond stopping the cars for a reasonable time, the conductor should have given to the plaintiff, if any, we leave as a question of fact for you to determine under all the circumstances developed by the evidence; and you may consider the ordinances of the city, making it the duty of the conductor to assist passengers to alight, in connection with other evidence in the case, giving it such effect as you think it entitled to.

The defendant was not an insurer of the safety of the plaintiff in alighting from the car, but by accepting her as a passenger on its car it bound itself to provide her with a safe car to transport her to the place of destination, and not to expose her to any hazard in alighting that reasonable care and prudence could prevent; and in taking passage on the car she took upon herself the hazards incident to passenger transportation upon the defendant's car, when properly managed, and upon a car competent for the service to which it was applied at the time of the injury.

Voris, Judge, in *Dussel v. Akron St. R. R. Co.*, Summit County Common Pleas. Affirmed by Circuit and Supreme Court.
Booth on St. Rys., Sec. 349.

No. 542. Injury to passenger by being thrown from car.—The fact that the plaintiff was injured by either having been thrown or by falling from the car does not, in itself, justify you in concluding that the defendant's employees were negligent, as charged in the plaintiff's petition. Negligence can not be assumed; it must have been proved by affirmative evidence.

(a) Duty of carrier to use high degree of care towards such passenger.

The defendant, being a common carrier of passengers, was required, through its employees in charge of the car, to

exercise the highest degree of care which might be reasonably expected of intelligent and prudent persons engaged in the business of running street-cars, considering the instrumentalities employed, and the dangers naturally to be apprehended. But the defendant was not obliged to insure the safety of the plaintiff as one of its passengers; it was not bound, absolutely, and at all events, to carry him safely without injury.¹

(b) Duty of such passenger—Correlative duty of passenger and carrier.

There was also a duty resting upon the plaintiff while he was a passenger upon the defendant's car. It was his duty to exercise that ordinary care and prudence which a prudent man would himself observe to save himself from injury. The degree of care on the part of the railroad company was the highest degree of care and skill; the degree of care on the plaintiff as a passenger was ordinary care and skill. If he was guilty of negligence, if he did not observe ordinary care, and that contributed to his injury, he is not entitled to recover damages from the defendant.

If the plaintiff was negligent, and his negligence in any degree contributed to the plaintiff's precipitation or fall from the car, he can not recover.

(c) Plaintiff voluntarily leaving car while in motion.

Therefore if the plaintiff voluntarily left his place in the car, took his position on the step, and there remained while the car was going at the rate of eight or ten miles an hour, he thereby assumed the risk of any injury which might be caused by the usual or ordinary movements of the car. So, if he voluntarily jumped or stepped off the car while it was going so fast as to render the act dangerous, the fact that the car did not stop at — Street was no excuse for him to so jump or step off the car, and he was guilty of contributory negligence.²

¹ Booth on St. Rys., Sec. 327.

² D. F. Pugh, Judge, in Cronin v. Columbus Street Ry. Co., Franklin County Common Pleas. Leaving car while in motion. Booth on Street Railways, Sec. 337; Ganley v. Brooklyn City Ry., 7 N. Y. S. 854.

No. 543. Same continued—Giving information to conductor upon entering car, where passenger desires to stop—Duty of conductor in such case.—The plaintiff does not claim that he signaled, or otherwise informed the conductor just before the car reached — Street that he wanted the car to stop, but that when he paid his fare he gave him that information. If the conductor was so informed that the plaintiff wanted to get off at — Street, it was his duty to

stop the car so as to give him an opportunity to alight in safety, and if he failed to do that, and it was the cause of the plaintiff's injuries, and if plaintiff's negligence did not contribute to them, the company is liable to respond in damages.¹

Must have been the proximate cause.

If you find that he did give the conductor that information, was the failure of the conductor to have the car stopped the proximate cause, the legal cause of the plaintiff's precipitation from the car, if that was proved; did the plaintiff exercise ordinary care in stepping out on the car-steps, before the car stopped, and standing there as he says he did? If it was not the observance of ordinary care, the question for you to consider is, whether that was not the proximate cause of him being thrown, or of his falling from the car, instead of the failure of the conductor to stop the car.

If that conduct of the conductor of his was the proximate cause, he can not recover. The failure of the conductor to stop the car must have been the proximate cause to entitle him to recover. It is difficult to make this plain; I mean what is in law proximate cause. His precipitation or falling from the car must have been the natural or probable result of the conductor's failure to stop the car, if that was proved. The failure of the conductor to stop the car, if a fact, must have been the direct cause of his injuries, not in point of time, but in relation to the plaintiff's precipitation or falling from the car. Between the failure of the conductor to stop the car, and the precipitation or falling from the car, there must have been no intervening and independent cause, disconnected with the fault of the conductor to stop the car, and self-operating, which produced the plaintiff's precipitation or falling from the car. If the plaintiff informed the conductor that he wanted the car stopped at — Street, he had a right to expect that he would stop it there so he could get off; but did that authorize him, in the exercise of ordinary care, to go out and get on the step of the car, if that was a place of danger, when the car was going? Did it authorize him as a prudent man to go out on the step? If you answer these questions in the affirmative, then you must find for the plaintiff; but if you answer them in the negative, you must conclude that the conductor's failure to so stop the car was not the proximate cause of the plaintiff's precipitation or falling from the car.²

¹ See Booth on St. Ry., Sec. 737.

² David F. Pugh, Judge, in Cronin v. Columbus Street Ry. Co., Franklin County Common Pleas.

No. 544. Contributory negligence in boarding moving street-cars.—Whether or not it is negligence to board moving street-cars depends upon the rate of speed at which the car is going. If the plaintiff attempted to board the car when it was moving at a rapid rate of speed, or such rate of speed as made it dangerous to get on, it was negligence on his part to attempt to board the car when it was so moving, and if that negligence contributed in any degree to his injury, it would be contrary to the law for you to find a verdict in his favor, although the evidence may satisfy you that those moving the car were also negligent.

If the car was moving either slowly or rapidly, the duty did not devolve upon the driver to stop the car until the plaintiff got on and got into his seat safely. But if the evidence shows that the car was standing still, and especially if at a place where a passenger had a right to get on, or if it was standing still at any place that would give a passenger a right to get on, and the driver saw the plaintiff getting on, it was his duty not to move the car till he was on and had a reasonable time to take a seat, and if he failed to wait, if the evidence shows to you that the car was standing still, and that he failed to wait until plaintiff boarded the car, and he saw the plaintiff getting on, then it was negligence on his part, and the defendant company is liable for any injuries that may have been caused to him in that manner.

D. F. Pugh, Judge, Franklin County Common Pleas.

It is not negligence *per se* to board a car while it is moving slowly. 137 Mass. 210; 69 N. Y. 195; Booth on St. Rys., Sec. 336. The person assumes all the ordinary risks. *Id.* The passenger must be given a reasonable time to board the car in safety. *Id.*, Sec. 348.

No. 545. Street railway—Boarding car.—*Statement.*—The claim of the plaintiff in this case is: That the defendant has not exercised in and about this matter the highest degree of care which was reasonable under all the circumstances, and such as would be expected of intelligent and prudent persons engaged in this business. The plaintiff claims that the car came to a stop, and that he stepped upon the footboard, and before he had time to obtain a seat, the car, unexpected to him, started; that in so doing he lost his balance, and that he was thrown against one of the seats of the car and injured.

The defendant claims that the plaintiff attempted to board the car before it came to a stop, and in doing so he received the injury by falling against one of the seats of the car, and that the plaintiff was guilty of contributory negligence in thus attempting to board the car, and in not properly protecting himself in getting on the car at the time and the manner

he did, and it claims that it has exercised the highest degree of skill and care which was reasonable under all the circumstances, that would be expected by intelligent and prudent persons engaged in this business, and that, therefore, there should be no recovery.

It was the duty of the plaintiff in boarding, or attempting to board the car, to use ordinary care in securing a seat, and if he delayed unnecessarily, and for an unreasonable time by standing on the footboard or otherwise, and so contributed to his injury, he can not recover. It was not negligence as matter of law for the plaintiff to board the car while it was in motion, if you find he did so, yet if he did, he assumed all the risks of the ordinary and usual movements of the car, if operated with the utmost care by the defendant's employees, and if injured under such circumstances, he can not recover.

It was the duty of the plaintiff at all times while boarding, or attempting to board the car, to exercise ordinary care and to make such use of his hands and arms to support himself, while on the footboard and entering from thence into the car, by means of the posts of the car, or other convenient means of support, if such there were, as a person of ordinary prudence, and in the exercise of ordinary care under like circumstances, would have exercised; and if he failed to do this, and so contributed to his injury, he can not recover. I can not say to you that ordinary care required him to take hold of the posts with both hands, or with one hand, or whether, under the circumstances, it required him to take hold of the posts at all or not. I leave that to you, whether, under all the circumstances of this case, he acted as an ordinarily prudent person would have acted under the same or similar circumstances in attempting to board this car. And this is also true of the defendant company. The question is left for you to determine whether or not the defendant company exercised the utmost care or the highest degree of care in carrying this passenger.

If you find the plaintiff got on the footboard of the car while it was at a standstill, and that, while he was standing on the footboard, and before he secured a seat, the motorman in charge of the car started, and in so doing exercised the utmost degree of care, starting it without any sudden jerk, then the court says to you that the defendant was not guilty of negligence, and your verdict must be for the defendant.

Gillmer, Judge, in *Gee v. Trumbull Electric R. R. Co.*, Trumbull County Common Pleas. Booth on St. Rys., Sec. 348.

No. 546. Boarding car while in motion.—If the car was slowed up, so that it would be reasonably prudent for the plaintiff to attempt to get on, and in the exercise of reasonable prudence and care under the circumstances, attempted to get on and failed, without fault on his part, he would not therefore be charged with contributory negligence; but if he did not so act prudently and carefully, under the circumstances then known to him, in attempting to get on while the car was yet in motion, then he would be held to have taken the risks of the want of such prudence and care, if voluntarily undertaken and encountered by him. . . .

We can not say to you as a matter of law whether or not it was negligence for plaintiff to attempt to board the car while it was in motion, if you find it to have been in motion from the evidence, or with one of his hands or an arm encumbered by his dinner-basket, but we leave it to be determined by you, from all the circumstances given you in the evidence, whether he was or was not guilty of contributory negligence in attempting to get on the car, as the evidence shows he did.

But if the car was not in motion, but was stopped to enable him to get on the car, and, while he was so attempting to get on, it was suddenly started, and before plaintiff had reasonable time to get on board, and the plaintiff was thereby injured, without his fault, then we say to you that the plaintiff would be entitled to recover therefor, if in other respects he is entitled to recover under these instructions given you.

Voris, Judge, in *Sourek v. Akron St. Ry. Co.*, *Summit County Common Pleas.* Booth on St. Rys., Sec. 336.

No. 547. Duty of street railway employees in charge of car to look out for signals—Starting car before passenger boards car.—It was the duty of persons in charge of the car to look out for signals to stop at the west crossing of — Street, that being a regular place to receive passengers. If plaintiff, standing on said crossing, gave such signal which either was or should have been seen by them, and the car stopped at said crossing and he began to board the same, plaintiff had the right to assume that his signal had been seen and complied with, and that the car would not be started until he was safe on board. It was the further duty of those in charge of the car to exercise care to see that it was not started again until he had reasonable time to get on board; and if it was started, by reason of their failure to exercise care, while he was in the act of boarding it, and he was in-

jured in consequence, without fault on his part, he is entitled to recover.

Philip H. Kumler, Judge. Given by request in Mt. Adams & Eden Park Inclined Ry. v. Peppard, S. C. 2927. Judgments affirmed. Booth on St. Rys., Sec. 347.

No. 548. Boarding car while in motion.—*It is not negligence, as matter of law, for one to attempt to board such a car as that in question while in motion, but the question is one for the jury to decide from the circumstances as they find them from the evidence.* If the plaintiff was at the crossing aforesaid, and gave such signal, so that it was or should have been seen, and the speed of the car was thereupon slackened, so that when it reached him the car was going so slowly that plaintiff was justified as a man of common prudence in endeavoring to enter it, he is entitled to recover, although the car did not come to a full stop, if his injury was due to the negligence of those in charge of the car in starting it at a more rapid speed while he was in the act of getting on board, without fault on his part.

If plaintiff was standing at said crossing and so signaled, and the car thereupon either was stopped, or so slackened speed, and he was so injured by their fault, and without fault on his part, the fact that his signal was not seen, and such stopping or slacking speed was done for some other reason, if such were the fact, would not affect his right to recover. So stopping or so slacking speed, as to justify an attempt to get on board, would be an invitation to enter the car, if those in charge of it knew or should have known that plaintiff so intended, and in that case it was their duty to use proper care to see that the car was not started or its speed increased until he was safe on board.

It makes no difference as to plaintiff's right to recover whether the car started or increased speed suddenly or with a jerk, or otherwise, if its so doing was due to negligence on the part of those in charge of it, and was the cause of plaintiff's injury, without fault on his part. That is, if he was at said crossing and was justified under all the circumstances, as a man of ordinary prudence, in attempting to board the car as he did.

Philip H. Kumler, Judge, in Mt. Adams & Eden Park In. Ry. v. Peppard, S. C. 2927. Judgments affirmed. Booth on St. Rys., Sec. 336.

No. 549. Distinction between street railroad and steam railroad—As to stops.—In order to make this charge plain to you, I want to call your attention to a distinction between

a steam railroad and a street railroad, with reference to the stopping of trains. A steam railroad stops at designated stations for the purpose generally of receiving and discharging passengers. When a steam railroad stops at such a station, the managers or operators of such train are presumed to know that passengers might get off and on at those stations, because that is the general purpose of such stoppage. The street railroad has but two definite points of stopping, *i. e.*, at both termini—at both ends of the road; and between the termini they have no such thing as stations as a steam railroad has. They do not stop for the general uniform purpose of letting off or taking on passengers. A street railway winds its way on its tracks through the streets of a city, and it, in its operation and management, is subject to such delays and interferences as arise from the use of the streets by others for lawful purposes; consequently there might be stops between termini on the part of the street railroad management that are not for the purpose of taking on or putting off passengers.

I call your attention to that so that you do not take a general and inadvertent idea that every time a street railroad train stops it must be for the purpose of taking on or putting off passengers; but among other duties required of the street railroad management, is that they are to stop for the reception or discharge of a passenger or passengers when especially requested or notified to do so in some way or other. Of course, you know it required no particular form of request—any signal that would convey that idea to the management would be sufficient.

Schroder, Judge, in *Mt. Adams & E. I. P. Ry. v. Wysong*.

No. 550. Stopping cars for passengers to alight and starting again—By conductor upon notice, etc.—If you find from the evidence that in this case the defendant's conductor stopped the car himself upon a notice communicated to him by this plaintiff, and started the car before she had fully alighted, then your verdict will be for the plaintiff.

(a) *By gripman to receive passenger—Passenger leaving car at that time.*—

If, however, you find that the conductor himself did not stop the train, but that it was done by some other person on the train at the plaintiff's request, or that it was done by the gripman in order to receive a passenger from the street, and if, upon the stopping of the car, the plaintiff proceeded to leave it, and in leaving it the train was started without any notice or expectation on her part, and she was thrown to the

ground and injured, then it will be for your decision to determine whether the defendant was guilty of ordinary neglect which directly caused the injury complained of.

(b) *Knowledge of conductor of intention of passenger to alight—Duty to look out for departure.*—

If the conductor knew, or had reason to know, that the plaintiff intended to leave the car when it stopped at the corner, and if you find that at that point the car stopped, it was then the duty of the conductor to look out for her departure, and to wait such length of time as would have enabled him to know that she had not given up the intention of getting out of the car. And if, under such circumstances, he did this—that is, if you find that he had notice, or that he really knew that she wanted to get off at that point, and if you find that he did wait long enough so that he was enabled to determine that she did not intend to get off the car, and yet, notwithstanding what he did, this injury happened, or this thing happened, then there is no negligence chargeable to the defendant, and your verdict will have to be in favor of the defendant.

If, however, under such circumstances he did not look for her departure, and did not wait the requisite time already described to you, and if in consequence thereof, and a direct result of it, the car was caused to start, and she was thrown and injured as she claims, then there is negligence as would make the defendant answerable to the plaintiff.

If, however, you should find that the conductor did not have reason to know that the plaintiff intended or wanted to leave the train where it stopped at the corner, then you are to determine whether his want of knowledge was the result of any negligence on his part, whether it was negligent for him to proceed afterward to the grip-car before ascertaining whether any passengers intended to get off, or whether it was negligent on his part, in view of the crowded condition of the car, to abstain from working his way through the car towards the front, and if he had done so, whether he could have ascertained that she wanted to leave the car—whether it was negligent for him to do what he did under the circumstances, and if that negligence had a tendency or caused him to remain in ignorance as to her intention.

Now, in determining this question of negligence, should you find that he had no notice, or did not know that she was about to leave the car, or intended to leave the car at this point, you can take into consideration whether, if he had exercised care with reference to ascertaining whether she wanted to get out of the car or not, it would have helped him

any. You can take that into consideration, because even if he were careful, and even if he had taken steps under the circumstances, keeping in mind the hour of the day, the condition of the train, the management of the train at that point, even if, under those circumstances, had he been careful, and yet could not have ascertained, under the circumstances, that she wanted to leave the train, if you even should find that that was careless on his part, that carelessness could not be said to have contributed to her injury, and in that event your conclusion upon that point must not be against the defendant.

Schroder, Judge, in *The Mt. Adams & Eden Park Inclined Ry. v. Wy-song*. Dismissed in Supreme Court. To save reversal on account of excessive verdict remittitur was made in Circuit Court. The charge is good. See Booth on St. Rys., Sec. 349.

No. 551. Injury while alighting from car by catching clothing on car—Duty of passenger and company.—"The jury are instructed that this case is to be determined upon the facts offered in evidence, and not upon any theory advanced to explain circumstances; that is to say, that before the plaintiff shall be entitled to a verdict for any amount, the evidence must satisfy the minds of the jury that the defendant, its agents or employees had carelessly and negligently maintained or permitted some obstruction to be on or upon the platform or step of said car, whereby the dress of the lady in the act of leaving the car would be caught. The evidence must prove this fact. If it does not, and the defendant, its agents or employees not being otherwise negligent in the discharge of their duty, and the plaintiff herself, in leaving said car carelessly, neglected, in the exercise of ordinary care, to handle or take care of her dress skirts, and such negligence or carelessness of the plaintiff was the proximate cause of her injury, she can not recover, and your judgment should be for the defendant."

"The plaintiff in this case claims that her dress was held in some way upon the platform of the defendant's car, and that the conductor negligently started the car while it was so held. If it was held upon the platform or step by some object or force, that is a separate and independent fact, and if you find the evidence justifies you in finding such to be the fact, you may do so without determining how or by what it was held."

"The plaintiff was not bound to apprehend any carelessness upon the part of the defendant. She had a right to rely upon the defendant having its platform in good condition and free from obstacles of an unusual character upon which her dress might catch. She was not bound to apprehend that

the conductor might start the car while her body was in contact with it, or until she was free from it and had reached a position of safety. She was not bound to apprehend that she might do anything that would place her in jeopardy. On the contrary, she had a right to place full reliance on the defendant doing its full duty towards her, and exercising the high degree of care which the law requires of it."

From *Patterson v. Inclined Plane Ry. Co.*, 12 O. C. C. 280; *Booth on St. Rys.*, Sec. 349.

No. 552. Prima facie negligence arises from collision.—

If you find from the evidence that plaintiff took passage in one of defendant's cars to ride from — to —, and while thus riding in the car of the defendant company, and without negligence on her part, a car of the defendant company on the same track, running at a high rate of speed, collided with the car upon which the plaintiff was riding, and from such collision she was injured, a *prima facie* presumption of negligence arises against the defendant company, and that such presumption must be explained away or accounted for by the defendant before it can absolve itself from the liabilities arising from this presumption of negligence.

Gillmer, Judge, in *Klipp v. Trumbull Electric Railroad Co.* See *Booth on St. Rys.*, Secs. 323, 361; *North Chicago St. Ry. v. Colton*, 29 N. E. Rep. 899; 32 Minn. 1.

The degree of care which should be exercised to avoid collisions is such watchfulness and precaution as are fairly proportioned to the dangers to be avoided, judged by the standard of common prudence and experience. *Id.*, Sec. 309.

No. 553. Duty of, as common carriers and as to cars and appliances.—A common carrier of passengers on street-car is required to exercise the highest degree of skill and care which may reasonably be expected of intelligent and prudent persons engaged in that business, in view of the instrumentalities employed, and the dangers naturally to be apprehended. The carrier is not an insurer of the safety of its passengers, and is not bound absolutely and at all events to carry them safely and without injury. They take the risks of their own carelessness of dangers that could not have been averted by the carrier by the exercise of the degree of care that the law demands.

A carrier is bound to furnish and maintain safe cars and appliances, whether old or new, but the employment of the appliances which are in universal and common use can not be said to be negligence, nor can it be said that the mode of construction is defective and not reasonably safe, when the

danger is dependent upon conditions which are the result of the negligent conduct of the passengers or the company's servants. A carrier will not be liable for injuries caused by the defect which is of such a character that no prudent man would anticipate danger from it, and so obscure as to escape observation during a careful daily inspection, and where there is nothing to show how long the defect has existed before the time of the accident. The defendant is not guilty of a breach of its duty, if it secures the best appliances for the conduct, control, and safety of its cars, after due investigation, and subjects the same to the best tests, and has all the machinery of its cars constantly and thoroughly examined; and the fact that one of the appliances fails to perform its usual duty going down a hill does not alone prove negligence on the part of the defendant company, provided the company has properly inspected and examined the machinery and tested it before use. The criterion of negligence in such cases is not whether the particular defect which was the cause of the injury could possibly have been detected by the use of scientific means of investigation, but whether the defect ought to have been observed practically and by the use of ordinary and reasonable care. . . . It was the duty of the defendant company, before attempting to descend the hill in question with its car, to know that its tracks over which the car had to run, and its appliances and machinery for stopping the same were in good order and properly adjusted.

Gillmer, Judge, in *Klipp v. Trumbull Electric Railroad Co.*, Trumbull County Common Pleas. Booth on St. Rys., Sec. 332.

No. 554. Injury to person on track—Duties of servants of company and foot traveler.—The court says to you that if you find from all the evidence that the motorman who had charge of the car which struck the plaintiff could by the exercise of ordinary care have seen the plaintiff and stopped the car, and that by reason of the failure to stop the car plaintiff was knocked down and injured, it would be such negligence on the part of the defendant as would enable plaintiff to recover, provided that plaintiff was free from contributory negligence on his part.

Or if the motorman saw plaintiff on the track, or by the exercise of ordinary care could have seen him, in time to stop the car, but did not, and purposely and intentionally ran into him, then defendant would be guilty of negligence, and it would be true, even though plaintiff was guilty of negligence in going on or in attempting to cross the track in front of said car. The court says to you, however, in this con-

nection, that the motorman had the right to presume that the plaintiff would not attempt to cross the track when he was so near that it would be unsafe and dangerous for him to do so. He further had the right to presume that the plaintiff would step off the track before the car reached him, providing he was on it. He also had the right to presume that plaintiff would exercise ordinary care in attempting to cross the track, as we shall explain hereafter. And if the motorman, in relying upon these presumptions, as he had a right to do, ran his car so close to plaintiff that he could not stop the same in time to avoid the accident, or in attempting to stop the car struck the plaintiff or brushed him off the track, then defendant would not be guilty of negligence.

The plaintiff had the right to presume, in absence of knowledge to the contrary, that the defendant company, in respect to the rate of speed at which it propelled its cars, would conform to any ordinance which the city had properly passed with reference to this subject, and it would not be negligence on his part to act on this presumption in exposing himself to such danger as could only arise through a disregard of the ordinance by the defendant company.

It was the duty of the plaintiff, in approaching this street-car crossing, to both look and listen before he attempted to pass over said track in front of the approaching car. And that if the jury find that he did not look and listen before stepping upon the railroad track, when, if he had looked and listened, he could have avoided the injury, then the court says to you that he can not recover; that this would be contributory negligence which would prevent his recovery.

The court further says to you that if there was nothing to prevent or obstruct his view from seeing the approaching car if he had looked, then the law presumes that he looked carelessly and negligently, and he can not recover in that case for the reason that it was his duty to look carefully.

The court further says to you that if the plaintiff, as he approached and attempted to cross the street-car track, took upon his shoulder a bag, or took a bundle, which would prevent him from looking, or seeing the approach of the car, and it was for that reason that he did not see it, when if he otherwise might have done so in time to avoid the injury, then he was guilty of contributory negligence.

The court further says to you that if you find from this evidence that the plaintiff could see the car as he approached it, as well as those operating the car could see him, then it was not the duty of those operating the car to stop, any more than it was the duty of the plaintiff to stop before he got up-

on the track in the way of such car; and if you find from the evidence that such was the case, that is, that plaintiff could have seen the car as above stated, then you should find for the defendant; that is, if both parties were guilty of negligence then there can be no recovery.

Gillmer, Judge, in *Rapple v. Youngstown St. Ry. Co.*, Trumbull County Common Pleas.

No. 555. Ejection of passengers for refusal to pay fare—Transfer tickets.—The carrier, in pursuance of his rights and duties, may eject from its cars persons on board who wrongfully refuse to pay the legal rate of fare; but this dangerous discretion must be prudently and rightfully exercised. If you find that the transfer ticket came into the hands of the plaintiff wrongfully, it would not entitle him to ride on it; and if he attempted to ride on it, on refusal to pay the legal rate of fare he might rightfully be ejected from the car by the defendant. But if he pay the legal rate of fare and receive the transfer ticket from the transfer agent, to enable him to complete his ride to the point of destination for which he had paid, then he could not be rightfully ejected, so long as he conducted himself with propriety, and did not violate the reasonable rules of the railroad company.

From *Steffee v. R. R. Co.*, Summit County Common Pleas. *Voris, J.*
Upon the subject and in support of charge, see *Mahoney v. Detroit City Ry.*, 53 N. W. 793; *Frederick v. Railroad Co.*, 37 Mich. 342.

No. 556. Reasonable rules regulating transfer tickets.—It is the right of the defendant company to adopt reasonable rules and regulations for the management of its business, and to direct the manner of using transfer tickets; but such rules and regulations should be uniform in their operation to make them reasonable. It is for you to say from the evidence whether the plaintiff violated any rule or regulation of the company, and whether, if he violated any such rules, they were reasonable or not.¹

The court leaves it for you to say, under the circumstances, whether or not, if the plaintiff boarded the cars at — to go to — Street, on the defendant's line, that he must use his transfer ticket on the first car going west after receiving the transfer ticket to enable him to complete his ride to the place of his destination. This, like all other facts to be found by you, must be found from evidence.²

¹ As to regulation and custom as to transfers, see *Booth on Street Railways*, Sec. 237.

² From *Steffee v. The Akron Street Railroad Co.*, Summit County Common Pleas. *Voris, Judge.* *Booth on St. Rys.*, Sec. 237.

No. 557. Damages recoverable for wrongful ejection of passenger.—The jury must be instructed that the plaintiff, if entitled to recover, may be awarded the usual kinds of damages—compensatory and exemplary, which have been explained frequently elsewhere, by instructions given in other kinds of cases, but the charge given in the particular case found in the preceding sections will, nevertheless, be inserted here.

If you find for the plaintiff, the further consideration of damages comes in. In that case his damages should be compensatory, and in one aspect of the case they may be more.

Compensatory damages include such sum as in your judgment he ought to receive for the injuries caused by the wrongful acts, that naturally or ordinarily resulted from the wrongful acts. This includes injury to personal feeling, sense of humiliation and insult growing out of the manner of committing the wrong, the public exposure and imputation of crime to commit a fraud upon the company in beating a ride, by reason of the wrongs you find from the evidence were committed. This is a matter very much within the discretion of the jury, but this must be a discretion reasonably exercised.

If you find from the evidence that in the commission of the wrong it involved the ingredients of fraud, malice, insult or oppression, and the plaintiff had conducted himself within the proprieties of the place, you may go beyond the rule of mere compensation and award exemplary or punitive damages; that is, such damages as will compensate him for the wrong done to him, and to punish the defendant, as well as to furnish an example to deter others. We feel it incumbent upon the court to say to you that in the exercise of your discretion to visit exemplary damages upon the defendant you should do it with exceeding caution. In case you should find for the plaintiff you may take into consideration, as compensatory damages, reasonable counsel fees employed by the plaintiff in prosecuting this action.

From *Steffee v. The Akron Street Railroad Co.*, Summit County Common Pleas. *Voris, Judge.* Booth on St. Rys., Secs. 419, 197.

No. 558. Negligence—Injury to passenger while assisting driver of street-car.—If the plaintiff was requested by the driver of the car to assist in pushing it back, and in doing so was injured by the negligence or carelessness of the driver of the car on which he had been riding, or of another car, he can recover if such assistance was apparently necessary. Or if there was an actual necessity for him to assist the driver in

pushing back the car, and he did so assist, and while doing so was injured by the negligence of the driver of this car or of another, he can recover, whether he was requested by the driver to assist or not.

From *Street Railway Company v. Bolton*, 43 O. S. 224.

No. 559. Action by street railway against commercial railway for injury.—You will proceed to inquire whether or not the car of the plaintiff was damaged at the time and place referred to, and if you find that it was not so damaged you should return a verdict for the defendant; but if you find that it was so damaged, then you will proceed to inquire whether such damage was caused directly by the negligence and want of care on the part of the defendant at that time in any or all of the particulars complained of, and whether such negligence and want of care was the proximate and sole cause of such damage; and if you find that it was not so caused, then you need inquire no further, but should return a verdict for the defendant; but even if you should find that the car of the plaintiff was damaged by the negligence and want of care on the part of the defendant, this would not entitle the plaintiff to recover unless you also find the plaintiff was in the exercise of ordinary care on its part, and that the conduct and acts of the plaintiff on that occasion did not contribute to the injury of which it complains; and even if you should find that the defendant was negligent, and such negligence and want of care resulted in damage to the plaintiff, yet if the conduct of the plaintiff was negligent, and this negligence and want of care contributed to the injury which it sustained, it could not recover in this action, and your verdict should be for the defendant.

Both parties being corporations the questions of negligence and contributory negligence are to be determined from the conduct and acts of the respective employees in charge of their business; that is, the driver of the street-car on one hand, and those in charge of the gate and the engine on the other hand. The defendant was bound to exercise ordinary care towards the plaintiff in running and operating its locomotive upon and along its track, and in crossing the track of the street railway of the plaintiff, and the plaintiff was bound to use ordinary care on its part in crossing the railroad track of the defendant. . . .

In determining the questions, you should carefully consider the ordinances of the city of Y., one of which requires the locomotives passing through the city limits to run at a speed less than six miles per hour, and if you should find at the

time of the collision the engine was being run by the defendant at a speed greater than six miles an hour, this fact alone would not be sufficient evidence to entitle the plaintiff to recover, yet it is competent evidence to be considered by you in connection with the other evidence adduced, as to whether or not the engine was being run at a dangerous rate of speed, and whether or not the defendant is liable for negligence or want of care on that occasion. Neither would the failure to sound the whistle of the locomotive, unless you find that the defendant by sounding the whistle could have avoided the collision with the car of the plaintiff, and that the failure to sound the same was negligence on the part of the defendant, which resulted in injury to the plaintiff. And if you find that the defendant maintained the gate at that crossing, and that the same was in charge of a gateman placed there by the defendant, the plaintiff, through driver of the street-car, had a right to rely upon the gateman properly discharging his duty; and if the driver of the street-car, upon approaching the crossing, found the gate open, it was an invitation to him to proceed, and it indicated to him that the track was then clear, and that he might proceed with safety; but he had no right to blindly rely upon this fact, and rush into danger which he saw or heard, or which, by the exercise of ordinary care, he might have seen and heard; and it did not absolve him from the duty of exercising ordinary care upon his part in entering upon the crossing and in crossing the track of the defendant. Notwithstanding this fact, the driver was bound to exercise his senses, to look and listen, and to take all such precautions as ordinarily prudent persons ordinarily exercise under the same or similar circumstances, to stop his car or proceed promptly across the track, whichever, under all circumstances, ordinarily prudent persons would have done; and if he did that which ordinarily prudent persons, under the same or similar circumstances, would not have done, or omitted to do that which ordinarily prudent persons would have done under the same or similar circumstances, and this act or omission on his part contributed to the damage which the plaintiff sustained, then the plaintiff could not recover, even though the defendant was negligent in having the gate open at that time.

Johnston, Judge, in *Youngstown Street Railway Co. v. N. Y. L. E. & W. R. R. Co.*

No. 560. Same continued—Running at high rate of speed—Ringing bell or giving warning upon approach of crossing.—If you find that the bell was rung or that warning

or signal was given by the defendant, then upon this issue you should find in favor of the defendant; but if you do not so find, but find that the bell upon the locomotive was not rung, and that no warning or signal was given by defendant, and that the failure to so ring the bell or give warning was the direct and proximate cause of the damage to the car of the plaintiff, and that the plaintiff was in the exercise of ordinary care on its part, then it would be entitled to your verdict, and the same rule applies in other particulars in which such negligence is charged. If the failure to shut the gate, or the rate of speed at which the locomotive was operated, or the failure to ring the bell or give other signals or warning, was the proximate cause of the damage to the plaintiff, and it was without fault on its part, that is, if it was itself in the exercise of ordinary care in all things it did or omitted to do, then the plaintiff would be entitled to recover.

Johnston, Judge, in *Youngstown St. R. R. Co. v. N. Y. L. E. & W. R. R.*, Mahoning County Common Pleas.

No. 561. Stoppage of car on crossing by driver.—If the driver of the car, on that night, after passing the gate, had sufficient time to have crossed the track in safety, but stopped his car and did not proceed promptly to cross the track, and by reason of the stopping the damage resulted, then the failure to shut the gate would not be the proximate cause of the injury, and the plaintiff would not be entitled to recover on that ground; and if the locomotive was running at a high rate of speed, and the plaintiff saw it in time to avoid the collision; or if by the exercise of ordinary care the driver of the street-car could have seen it in time to have avoided the collision, and did not do so, then such failure on the part of the plaintiff would constitute contributory negligence on its part, which would prevent a recovery.

Johnston, Judge, in *Youngstown St. R. R. Co. v. N. Y. L. E. & W. R. R. Co.*, Mahoning County Common Pleas.

No. 562. Negligence—Duty of children eleven years old in passing street railroad crossings.—It was the duty of the decedent (or plaintiff) to conduct herself with ordinary prudence and care in passing over the railroad crossing, such prudence and care as was commensurate with the existing dangers known to her, or that reasonably ought to have been known to her under the then existing circumstances, such as a child of her age would ordinarily exercise under like circumstances. If she knew or had sufficient judgment to appreciate the hazards of the railroad crossings, and undertook

to cross the same while the trains of said company were passing upon its tracks near and over said railroad crossing, she took upon herself the risks incident thereto, but her conduct should not be judged by the same rule as that of adults. And while it was her duty to exercise ordinary care and prudence to avoid the injury complained of, ordinary care for her would be that degree of care which children of the same age of ordinary care and prudence are accustomed to exercise under similar circumstances. All her conduct is to be treated in this light. . . . If you find by a preponderance of the evidence that the decedent was so guilty of negligence that directly contributed to her death, the plaintiff can not recover, for it was the duty of the decedent, at the time of her decease, to exercise ordinary care and prudence, the care and prudence of a child of her years and understanding, under all the circumstances then known to her, or that reasonably ought to have been known to her.

But if you do not find her so guilty of contributory negligence, and you do find under these instructions that the defendant was guilty of negligence herein defined and limited, your verdict should be for the plaintiff, and for such amount of damages as you shall find under the instructions given you upon that subject.

Voris, Judge, in *Gaston v. Lake Shore R. R. Co.*, Lorain County Common Pleas.

No. 563. Obstruction placed in street being paved which causes injury to street-car conductor.—The defendant in this action had the right to a reasonable use of the street. He had the right, so far as the plaintiff is concerned, to pave the street at the time and place that he undertook to pave it. He had the right to put up obstructions to prevent vehicles entering upon that pavement, but in the exercise of that right, it was his duty to care for the rights of others, and construct such obstruction in a manner that would have due regard for the rights and privileges of persons passing along that highway.

The street-cars had a right to run along the line of track prepared for them on that highway. The conductor had a right to pass upon his car, and perform his duties thereon, as conductors ordinarily do.

Their rights were mutual, and defendant in erecting the obstruction was under a duty, under the law, to exercise such care and prudence in the erection of such obstruction, as not unnecessarily to interfere with or jeopardize plaintiff. Defendant was not bound to insure the safety of passersby, but

he was bound to exercise such care and prudence as persons of ordinary care and prudence would have used under similar circumstances to prevent accidents to them.

Now the inquiry for you in this case is as to whether or not the defendant, in erecting this obstruction, did have such regard for the rights of others, and the rights of this plaintiff, as persons of ordinary care and prudence would have had under similar circumstances, and the burden of proof to show such negligence rests upon the plaintiff. It is incumbent upon him to show by a preponderance of the evidence that the defendant was guilty of negligence. If the proof of the plaintiff does not show this, he can not recover, but you have the right to review all the testimony in the case to determine whether the proof is sufficient. It is for you to determine if defendant was guilty of negligence.

The presumption is that neither party was guilty of negligence, and that presumption must first be overcome by the plaintiff. When he has shown that the defendant was guilty of negligence, if he himself, in doing so, does not show that he also was guilty of negligence, then the burden is on the defendant to show that plaintiff was guilty of negligence which contributed to the injury, because the plaintiff would be presumed, in the absence of proof, to be free of all negligence in the matter. Thus, in the first place, the burden is on the plaintiff to show that the defendant was guilty of negligence, and on defendant to show that plaintiff was guilty of contributory negligence. But the negligence for which the defendant can be held liable is that which is known as the proximate cause of the injury, that is to say, negligence which directly caused or produced the injury. If defendant's negligence was the direct contributory cause, he may be held liable, notwithstanding the fact that some person other than the plaintiff was also guilty of negligence which contributed to the injury.

The plaintiff had a right to pass around on this car in the performance of his duties upon that street railroad, and if, while so doing, some person upon or in this car was guilty of negligence also in the conduct of the car, which, together with the negligence of the defendant, directly contributed to the injury, that would not relieve the defendant, because the doctrine of imputed negligence does not obtain in this state. I understand the law to be that when negligence is imputed to some other person than the defendant in an action, and that negligence, together with the negligence of the defendant, contributes directly to produce the injury, either one or both may be held liable for the consequences. It is no de-

fense to the one, that the other was likewise guilty of negligence. It was the duty of the plaintiff in this action, as well as the defendant, to exercise ordinary care and prudence in his action and conduct. If he were aware that there was an obstruction that was dangerous, and by exercising ordinary care and prudence he could have avoided it, it was his duty to do so. It is for you to take into consideration the facts, as disclosed by the evidence, and say whether plaintiff was, at the time of the accident, exercising that care and prudence which men of ordinary care and prudence would have exercised under those circumstances. Could he, by the exercise of ordinary care, have avoided it? Take into consideration the length of time the obstruction was there; the number of times, if at all, he had seen it, and his knowledge of its dangerous character; also the employment in which he was engaged; the necessity of standing on the footboard and passing around passengers; he had a right to do all these last mentioned things in connection with the performance of the duties of his position. He had a right to do all this, but, knowing and observing the obstruction which was there, could he have avoided collision with it? If he could, it was his duty to have done so, because he can not, as was read by counsel, throw himself against the obstruction and recover of the person guilty of placing it there, for the reason that there can be no division of the responsibility or damage done by their mutual negligence. Hence the plaintiff, if guilty of contributory negligence, must fail to recover. If the plaintiff was not guilty of negligence, and defendant was guilty, the defendant may be held liable in this case. If the defendant was guilty and the plaintiff likewise, the plaintiff can not recover in this case, and your verdict should be for the defendant.

Wm. E. Sherwood, Judge, in *Southern v. Williams*, Supreme Court, No. 3914. Judgments affirmed.

No. 564. Measure of damages—Personal injury—Medical evidence as to.—Where physicians testify that the plaintiff's injuries are permanent, and if she were sick from other causes, the injuries would cause serious complications, it is proper to submit to the jury the question of the plaintiff's liability to suffer more from other illness than she would otherwise have done.

A tort to health already impaired is redressed by giving damages both for any further impairment and for any obstruction occasioned by the tort to recover from any existing disease. It is the duty of the jury to consider the plaintiff's

physical condition before and since the injuries, the physical and mental pain suffered on account of the injuries, during the same time, and the amount of future pain to arise therefrom, together with all other circumstances shown in the evidence, and considering all the circumstances aforesaid is proper.

In the action to recover for the personal injury, medical evidence of plaintiff's condition, both before and after suit brought, is competent to show the natural effects of the injury, and its character as to permanence.

Voris, Judge, in *Dussel v. Akron St. R. R. Co.*, Summit County Common Pleas. Affirmed by Circuit and Supreme Court.

NUISANCE.

No. 565. Defined.—"The term nuisance, derived from the French word '*nuire*,' to do hurt, or to annoy, is applied indiscriminately to infringements upon the enjoyment of proprietary and personal rights."¹

Nuisance, something noxious or offensive. Anything not authorized by law, which maketh hurt, inconvenience, or damage.²

By hurt or annoyance is meant not a physical injury to the owner or possessor thereof, as respects his dealing with, possessing, or enjoying them.³ "Nuisance is a distinct civil wrong, consisting of anything wrongfully done or permitted which interferes with or annoys another in the enjoyment of his legal rights."⁴

If an individual or corporation (municipal or private) upon whom is imposed the burden of keeping a highway in repair, permit the same to be out of repair so as seriously to interfere with convenient transit over the same, is a nuisance, subjecting the person or corporation to damages at the suit of persons injured by reason of such defects or want of repair.⁵

To constitute a nuisance, there must be a material or substantial injury, and not an imaginative one. It may be diffi-

¹ Addison on Torts, 361.

² 46 O. S. 446.

³ Cooley on Torts, 670.

⁴ See Bishop's Non. Cont., Sec. 411 note; Cooley on Torts, 670 (565). A precise definition is impracticable, 12 O. S. 398.

⁵ Wood on Nuisance, Sec. 307; *Cardington v. Fredericks*, 46 O. S. 442.

cult in some cases to ascertain whether the injury be material; but it is a question for the jury to consider and determine.⁶

Hence to entitle plaintiff to recover in this action, you must find from a preponderance of the evidence that he has suffered a real, material, and substantial injury, and it is left for you to determine what amounts to such an injury.⁷

⁶ Cooper v. Hull, 5 O. S. 321-23-24.

⁷ Cols. Gas, etc., Co. v. Freeland, 12 O. S. 400.

No. 566. Degree of annoyance to constitute nuisance.—

What amount of annoyance or inconvenience will constitute a legal injury, resulting in actual damage, is a question of degree, and must necessarily be dependent upon varying circumstances, and can not be precisely defined as matter of law, but must be left to the good sense and sound discretion of the jury.¹ The court can only give you a rule which will serve as a guard against an unreasonable exercise of that discretion. You must be guided by the ordinary standard of comfort and convenience, and not by particular or exceptional above or below the ordinary standard. Regard should be had to the notions of comfort and convenience entertained by persons generally of ordinary tastes and susceptibilities. What such persons would not regard as an inconvenience materially interfering with their physical comfort, may be properly attributed, when alleged to be a nuisance, to the fancy or fastidious taste of the party. On the other hand, the charge of a nuisance, if it be of a thing offensive to persons generally, can not be escaped by showing that to some persons it is not at all unpleasant or disagreeable.²

By a material injury is meant one resulting in damages of a substantial character or nature, not merely nominal, and which are, in some cases, awarded to prevent a wrong from ripening into a right by lapse of time.³

¹ 5 Ohio, 323; 12 O. S. 399.

² Cols. Gas, etc., Co. v. Freeland, 12 O. S. 392, 399; see Bishop's Non-Cont. Law, Sec. 416; 44 O. S. 279; 22 O. S. 247, 253.

³ Crawford v. Rambo, 44 O. S. 279.

Damages may be awarded when the circumstances would not entitle the injured to an injunction. Id.; Jaggard on Torts, 808. As to what will be allowed by way of damages, see Id. 808-09.

No. 567. Opening of excavation in street adjoining premises—Liability for injury resulting to traveler therefrom.—

(a) Ownership of property—Dominion over it—May exclude persons from it.

The ownership of property implies absolute dominion over it, as against all other persons, subject, however, to the

application of a well-known maxim of the law which requires that everyone shall use his own property so as not to injure another person. But this maxim is not infringed by any lawful use by the owner in places where a stranger may not rightfully come. The dominion which the owner of the property has the right to exercise implies that he may exclude or prevent all persons from coming upon his lands, and whoever does enter upon his lands without the consent of the owner, express or implied, is a trespasser and assumes the risk incident to such invasion, subject, however, to certain qualifications. The only difference between an express and implied consent consists in this, the one is expressed by words, the other by the surrounding circumstances and conduct of the parties implying that it would be unreasonable to hold to the contract.

Where there is no special relation alleged as understood between the plaintiff and defendant, the defendant is under the legal obligation or duty to control and manage these premises in such reasonable and prudent manner that he shall not wrongfully injure others rightfully upon said premises by any culpable acts or omissions. . . .

The owner of land is not liable for injury resulting from the unsafe or dangerous condition of his premises to persons who go upon them without invitation, express or implied.

The defendant would not be liable to the plaintiff for an injury resulting from the unsafe or dangerous condition of his premises, though adjacent to ——— Street or a private way.

Duty of traveler on highway.

The law imposes the duty of ordinary care upon all persons traveling on the highway, that degree of care commensurate with the hazards of the highway known to him, or that would be known to him, had he exercised reasonable care and prudence under the circumstances. But the plaintiff can not charge his errors and mistakes of judgment resulting in injury to him unless the defendant has, by his wrongful acts or misconduct, misled him into such errors or mistakes of judgment.

Private road.

You are instructed also that protection can only be extended to the plaintiff against the hazard of the excavation upon the ground that he was upon a private road, having the right to presume from circumstances that the same was a highway upon which the public had a right to travel.

A person is not justified in making or maintaining excavations either in dangerous proximity to, or in a path where he permits other persons to traverse, or so near a public road

that travelers in the ordinary aberrations or casualties of travel may stray or be driven over the line, and be injured by falling into such excavations.

Beyond this liability to the trespasser, voluntarily or involuntarily trespassing, does not go. The owner may make whatever excavations he chooses on his land without fencing them in, provided they are not on the line over which he permits travelers to pass, or so near a public road that leads into them, a traveler may unwittingly follow.

The question therefore is, was or was not said excavation located so near to said — Street and said private road, in the manner it was kept, as to make it dangerous for a party passing along said — Street in a usual and ordinary manner? If it was it was the duty of the defendant to provide such safeguards as would reasonably protect the party traveling thereon. Was or was not said private road so constructed, located and ordinarily used as to make it reasonably apparent that it was a public-traveled road, so as to reasonably induce the public to go thereon? If so, then the defendant was in duty bound to provide such safeguards about said excavation as to make it reasonably safe for persons rightfully traveling in said street and private road.

Voris, Judge, in *Schoner v. Schumacher Milling Co.*, Summit County Common Pleas. Affirmed by Circuit and Supreme Court without report. Duty of owner when he invites others to come upon his premises to exercise ordinary care to have the premises reasonably safe. *Cooley on Torts*, 718. Individual adjoining owner to street who makes excavations in sidewalk commits a nuisance, and is liable to any person who, in the exercise of ordinary care, is injured therefrom. *Cooley on Torts*, 748 (626); *McIlvaine v. Wood*, 1 Handy, 166.

No. 568. Duty of lot-owners where an excavation is made in sidewalk in front of premises by contractor.—If the defendant, for the purpose of constructing a block of buildings, removed, either by himself or by anybody else, if he caused to be removed this sidewalk and made the excavation and opened this hole into which the plaintiff fell, it is the duty of the defendant doing that by himself or by his agents, by his independent contractors, or in any other way, it is his enterprise; he is doing it for his benefit; it is his duty to use ordinary care to see that it is guarded and protected by the use of such ordinary care as men of ordinary prudence are accustomed to employ in that kind of enterprise. It is no defense for him to say that the work was being done by an independent contractor.

From *Hawver v. Whalen*, 49 O. S. 69. This is apparently in conflict with the doctrine laid down in *Clark v. Fry*, 8 O. S. 358, but as the court say in this case (*Hawver v. Whalen*), the principle underlying the instruction

does not necessarily conflict with the doctrine of *Clark v. Fry*, *supra*, provided that the doctrine of that case is to be strictly limited to the facts upon which it was announced. In *Clark v. Fry* it is held that the rule *respondet superior* does not apply in case of an injury sustained by reason of negligence in the manner of conducting the execution of a job of work in building a house, where the house-builder by a contract with the owner of a lot, has taken upon himself the responsibility of the employment of his own hands, and the control and direction of the work in conformity with the terms of the contract. If the necessary or probable effect of the performance of the work would be to injure third persons, or create a nuisance, then the defendant is not relieved from liability, because the work was done by a contractor over which it had no control in the mode and manner of doing it. *Railroad Co. v. Morey*, 47 O. S. 207. The making of an excavation across a public highway, which materially interferes with public travel, is an unlawful act, unless authorized by proper authority, and this because such excavation creates a nuisance.

If the defendant caused such an excavation to be made, it can not shield itself from liability if injury resulted to persons traveling upon such highway, because they had the excavations made by independent contractors over whom they had no control, unless it caused all reasonable precautions to be taken to prevent such injury. *Railroad Co. v. Morey*, *supra*.

No. 569. Responsibility of lot-owner for excavation made in premises in front of premises by independent contractor.—The rule of law is, that where the owner of a lot of land removes a section of the sidewalk along the public street in front thereof for the purpose of constructing a block of buildings, and excavates a deep hole for the purpose of building vaults and areas under the sidewalk to connect with the basements of his buildings, and to be used in connection therewith, and while such vaults or areas are in process of construction the excavation is left with insufficient guard or covering to protect pedestrians who are lawfully there, and one of the latter falls into such excavation or area and is injured, it is no defense to an action by the injured party against the owners of the lot that they had contracted with an independent contractor to build the vault and areas, and that this independent contractor had omitted to cover, guard and protect the opening.

If these defendants took out and removed a section of that sidewalk to the depth of eight or nine feet for the purpose of building vaults and an area under it for their own benefit, to be used for their own building, it being of such a character as to cause an obstruction in the midst of a traveled public thoroughfare or sidewalk; if they did that, and left it unguarded and unprotected, and if they failed to use reasonable care to guard and protect it, then it would not matter whether they had gone of themselves with their own shovels and their own hands to take out the dirt and make the excavation, or whether they employed another person to do it by the day, exercising supervision and control over him, or al-

lotted the job out to another person as a wholly independent contract; it would be their work all the time; it is their excavation, done for them by somebody whom they employed to do it, and they would be responsible to a member of the public who was rightfully using this street for the purpose of public travel, if, without any fault upon his part, he fell into that excavation and was injured. I instruct you that the law is that it is the duty of these defendants, being the owners of the premises, and the lot belonging to them, and the work being done for their benefit exclusively, it is their duty to see that no dangerous pitfall is created in front of their premises in work of that kind. It will be important then for you to inquire whether this place was negligently treated by these defendants. In other words, did these defendants exercise that reasonable and ordinary care which men of ordinary prudence and caution are accustomed to exercise under such circumstances.

From *Hawver v. Whalen*, 49 O. S. 69. Blandin, Judge.

No. 570. Duty of traveler on highway—May presume that city has performed duty with reference to streets—Lights and guards in streets.—The law imposes the duty of ordinary care upon plaintiff while traveling upon the public streets of the city, and that degree of care commensurate with the hazards of the highway known to him, or that would be known to him had he exercised reasonable care and prudence under the circumstances. . . . And this care must be commensurate with the ordinary hazards of the highway and of such public streets, and such as were incident to the construction of said street and road; and such other hazards as were known to him, or would be known to him had he exercised ordinary care and prudence. The plaintiff, acting in good faith in absence of knowledge to the contrary, is entitled to presume that the city would and did exercise reasonable care and prudence in performing its duty under the circumstances known to it, or that reasonably ought to have been known to it, in maintaining the street in reasonable condition and free from nuisance, so as to be reasonably safe for persons traveling upon the street.

While the defendant is not the insurer of the safety of the plaintiff while traveling upon the street in question, it is bound not to expose him to any hazards that reasonable care and prudence could prevent.

To enable you to say whether the defendant performed its duty in the premises, you should determine from the evidence whether proper lights, or guards, or other proper pre-

cautions were reasonably provided to warrant and protect persons traveling in the street of the dangers, if any, occasioned by the opening, and its relations to the sidewalk in question. If the defendant did not so guard the opened place and the sidewalk, it can not be said to have discharged its duties the law imposes upon it. The law imposes upon the city the duty of careful supervision, control, and maintenance of the public streets, and this duty extends to sidewalks of the city, which are essentially part of the public street of the city, and that it shall cause the same to be maintained and guarded in such a manner as not to constitute a nuisance.

The city can only discharge this duty by the exercise of all reasonable precautions to prevent injury to persons properly passing in the streets or on the sidewalks of the city from the injury.

Voris, Judge, in *McDonald v. City of Akron*, Summit County Common Pleas. No exception was taken to the charge.

For full discussion of the law involved in the above charge, see *Dillon's Mun. Corp.*, Sec. 996 *et seq.*

No. 571. Adjoining land-owners—Rights and obligations of, to each other—To what extent lower proprietor may dig.—Every man has the right to use his property in any way he may see fit, so long as he does not interfere with the rights of his neighbor, and the extent to which a man may dig and excavate upon his own ground which adjoins his neighbor's land, may be determined according to the natural lay and situation of the two pieces of land. That is to say, if the lower of two hillside-owners desires to dig upon his land, he may dig to any depth which would not disturb the upper one's land as it lay naturally, without any buildings, improvements or structures. If the digging of the lower one be such as not to disturb the land above, if it had no houses upon it, then he may dig to the same extent though a house be upon the land then, and if the house tumble down and fall by reason of such digging, the lower owner is not liable if he has used his land with regard to the upper land as nature made it, not as man made it; and this he has the right to do.

Wright, Judge, in *Commissioners v. Halm*, Hamilton Common Pleas.

OFFENSES AGAINST CHASTITY.

No. 572. Unlawful intercourse by teacher with female pupil—Teacher defined—Public school defined.—The statute under which the indictment in this case is drawn, so far as it pertains to this case, provides that "A male person over twenty-one years of age, who is superintendent, teacher or tutor in a private, parochial or public school, who has sexual intercourse at any time or place, with any female, with her consent, while under his instruction during the term of his engagement as superintendent, tutor or instructor,"¹ shall be punished as is provided in said statute. The material allegations of this indictment, and the things which it is necessary for the state to make out are as follows:

1. That, at the time of the alleged offense, the defendant was a male person over twenty-one years of age. 2. At said time he was a teacher in a public school in the Township of —, — County, —. 3. That he had sexual intercourse with M., with her consent, during the term of his engagement as such teacher. 4. That at the time he so had sexual intercourse with said M. she was a female pupil in said public school under the instruction of said I. 5. That said offense was committed within the County of —, in the State of —. 6. That said offense was committed on or about the — day of —, 18—, the exact date is not material. If you find from the evidence that the offense was committed on or about that time, or near to that time, that would be sufficient so far as the date is concerned.

And before the state would be entitled to a verdict of guilty against the defendant it must establish each and all of the foregoing propositions beyond a reasonable doubt.

I will now instruct you upon the law which should govern you in this determination of the case, and call your attention more particularly to some of the material allegations of the indictment.

It is claimed upon the part of the state that the defendant here on trial was a male person over twenty-one years of age at the time of the alleged offense. The law provides that the offense charged in the indictment must be committed, if at all, by a male person over twenty-one years of age. It is then a question of fact for you to determine from

¹ R. S., Sec. 7024.

all the evidence in the case whether the defendant at the time of the alleged offense was a male person over twenty-one years of age. If you find he was not, then you should acquit; but if you find that he was, then you should go further in the case and determine the other questions.

It is further claimed on the part of the state that at the time of the alleged offense the defendant was a teacher in a public school in the Township of —, — County, —. A teacher is one who teaches or instructs, or one whose business or occupation is to instruct others, is an instructor, a tutor. Public schools are "schools maintained at public expense for the elementary education of the children of all classes." I leave it then as a question of fact for you to determine from all the evidence in the case whether the defendant was a teacher in a public school in the Township of —, — County, —, at the time of the alleged offense.

Now, in determining whether the school which the defendant taught, and which M. attended, was a public school or not, you should look to all the testimony with reference to how the school was maintained and supported, who attended the school, and how the school was conducted, as well as all the facts and circumstances which have been given you in evidence on the trial of the case, and from it all say whether said school was a public school. It is a question of fact for you to determine from all the evidence and facts in the case.

Again it is claimed on the part of the state that the defendant had sexual intercourse with the witness M. during the time or term of his engagement as such teacher, and during the time he was so teaching said public school. The defendant on the other hand denies that he had sexual intercourse with the said M. during his engagement as such teacher.

As a matter of law it is provided by statute that "sexual intercourse shall be deemed complete upon proof of penetration only." Hence, if you find from the evidence that there was penetration, that would be sufficient so far as the proof of sexual intercourse is concerned without proof of emission.

In determining whether the defendant had sexual intercourse with said M., you should look to and consider the testimony of said M., and the other facts and circumstances which tend to corroborate her, if any. The testimony of the defendant and the facts and circumstances which tend to corroborate him, if any, and all other evidence, facts and circumstances which have been given to you on the trial of this case, and from it all say whether the defendant had sex-

ual intercourse with the said M. at the time and place charged in the indictment, and claimed by the state.

It then becomes a question of fact for you to determine from all the evidence in the case, whether the defendant had sexual intercourse with the said M., or whether he did not. One of the material allegations of this indictment is that the act of sexual intercourse was had by the defendant with the said M. with her consent. It is then a question of fact for you to determine from the evidence whether the act of sexual intercourse, if had at all, was had with the consent of the said M.

One of the material allegations of the indictment in this case is that the defendant had sexual intercourse with M., a female, with her consent, while under the defendant's instruction during the term of his engagement as a teacher or instructor. I say to you that if you find from the evidence given you in this case that the defendant had sexual intercourse with the said M., a female, under his instruction, with her consent, at the defendant's house, after school hours of one Saturday, and before school hours of the following Tuesday, that being the next school day, during the same term of school, such act would be during the term of his engagement as such teacher.

If you find from the evidence given you in this case that the defendant had sexual intercourse with said M., a female pupil of his, with her consent, it will be important for you to determine whether said act of sexual intercourse took place during the term of defendant's engagement as such teacher or instructor. If you find from the evidence that the defendant had sexual intercourse with said M., but further find that said act of sexual intercourse took place after the term of school had ended, after the defendant's term of engagement as such teacher had expired, then your verdict should be for acquittal. But if you find from the evidence that the defendant had sexual intercourse with said M., a female pupil of his, with her consent, during the term of his engagement as such teacher or instructor, then you should so determine by the verdict.²

² Nye, Judge, in *State v. Ingraham*, Lorain County Common Pleas.

No. 572a. Same continued—Character of evidence.—Now, gentlemen, as to the amount of testimony required to produce a conviction in a case of this kind, I say to you that "No conviction shall be had on the testimony of the person offended against unsupported by other evidence. I say to you that as to each and all the material averments in the indict-

ment, except the allegation of sexual intercourse, they may be proved by the testimony of one witness alone, provided the jury are satisfied beyond a reasonable doubt of the truth thereof by the testimony of such witness; and as regards proving the truth of such sexual intercourse, I say to you, that while that fact can not be established by the testimony of the person offended against, unsupported by other evidence, it may be proved by the testimony of the person offended against another corroborating facts and circumstances, corroborating such witness, provided the jury are satisfied beyond a reasonable doubt from the testimony of such witness and such corroborating facts and circumstances that such act of sexual intercourse took place between the parties. . . . The corroborating evidence need not be of sufficient force to equal the positive testimony of another witness, or such as would require the jury to convict in a case in which a single witness is sufficient, but that it must be such as gives a preponderance as to the evidence in favor of the state, provided the jury are satisfied beyond a reasonable doubt of the truth of the charge."

Nye, Judge, in *State v. Ingraham*, Lorain County Common Pleas.

No. 572*b*. *Same continued.*—Testimony has been offered and permitted to be given to you as to the reputation of the defendant for chastity and moral worth. The reasonable effect of proof of good reputation is to raise a presumption that the accused was *not likely* to have committed the crime with which he is charged. The force of this presumption depends upon the strength of the opposing evidence to produce conviction of the truth of the charge. Good reputation is certainly no excuse for crime, but it is a circumstance bearing *indirectly* on the question of the guilt of the accused, which the jury are to consider in ascertaining the truth of the charge. The evidence offered by the defendant of his good reputation for chastity and moral worth is to go to the jury and be considered by them in connection with all the other facts and circumstances, and if they believe the accused to be guilty they must so find, *notwithstanding his good reputation*.

Nye, Judge, in *State v. Ingraham*, Lorain County Common Pleas.

No. 573. *Bigamy—Defined—The statute.*—The statute of Ohio provides: Whoever, having a husband or wife, marries another, is guilty of bigamy. But this does not extend to any person whose husband or wife has been continually absent for five successive years next before such marriage,

without being known to such person to be living within that time.

The gist of the offense consists in going through the ceremony of a second marriage, which involves an outrage on public decency and morals, and creates a scandal by the prostitution of a solemn ceremony. The second marriage, if contracted in such form and manner that it would be binding upon the parties if they were legally competent, is sufficient to render one guilty of the crime of bigamy.

R. S., Sec. 7018. Whether or not the husband or wife has so been continually absent without being known to the person to be living is matter of defense to be proved by the defendant. *Stanglein v. State*, 17 O. S. 453.

No. 574. Bigamy—Domicile of divorced parties.—"If neither the husband nor wife was domiciled in the foreign state when the action for divorce was instituted or prosecuted, but both were then domiciled in Ohio, the decree of the court in the foreign state was void or inoperative beyond the limits of that state."

From *Van Fassen v. State*, 37 O. S. 317.

PARTNERSHIP.

No. 575. What constitutes partnership.—"If the jury find that the defendants were jointly interested in the business, in which the work and labor charged in the petition were performed, sharing the profits and losses between them; that constitutes the defendants partners, and renders them liable as such for liabilities incurred on account of such business."¹

To constitute a partnership there must be an agreement between the parties, that they will, from a certain date, share the profits and be responsible for debts and losses, and carry on the business for their mutual benefit; and there must be an entering upon, or conducting, or doing business under such agreement.²

The best-considered and least-objectionable test of a partnership is that of a community of interest in the profits of a business or transaction as a principal or proprietor.³

¹ *Warner v. Myrick*, 16 Minn. 94.

² *Thompson on Trials*, Sec. 1133, taken from *Lucas v. Cole*, 57 Mo. 145.

³ *Par. on Part. 71; Coll. on Part., Secs. 25, 44; Story on Part., Secs. 36, 38, 60; Berthold v. Goldsmith*, 24 How. 536.

But this test is valuable as a rule chiefly because it evinces a relation between the parties, where each may reasonably be presumed to act for himself and as agent for the others, and to that extent establishes the fact that the liability was incurred on the authority of all so participating in the profits. Participation in the profits is not regarded as a rule so uniform and unrelenting as to be unjustly applied. The true test of a partnership is left to be that of the relation of the parties as principal and agent, and if you find from the evidence that the relation of principal and agent existed between the defendants, that the one acted in the business for and on behalf of the other, by such acts they have incurred a joint liability, and you may then find that a partnership existed between them.⁴

⁴Harvey v. Childs, 28 O. S. 319, 321-22. Sharing in profits, even though by way of compensation, makes one a partner. Choteau v. Raitt, 20 O. 132.

No. 576. Partnership—What is general agency.—"The jury are to determine from the evidence in the case when the partnership commenced. If it was a general partnership formed generally for the purpose of dealing in cattle, and each was authorized to act for the firm, then the act of one would be the act of all, for each acts as the agent of the other. But if the jury should find that it was limited in its scope and operation, and was to take effect at the time only of the election of each partner in every particular adventure or purchase, then the partnership could not be held until the property became the general property of all."

From Valentine v. Hickle, 39 O. S. 19.

"It must be shown by the plaintiff that the cattle were bought by a member of the firm as a partner, and therefore as the agent of the firm, which gave them an immediate vested interest at the time of the purchase, so that they would have called upon him for the profits as charged him with the losses in any sale that he might have individually made to others." Valentine v. Hickle, *supra*.

No. 577. What constitutes partnership—Purchases by one partner.—"If the jury find that the defendants had any arrangement for shipping cattle, by which it was agreed that either of them might buy stock on his own responsibility; and upon its delivery for shipment at said place the others might take an interest in any stock so purchased and delivered, if upon examination of it they thought it suitable to ship or not purchased too high; or by which, if they purchased stock when all together, it was to be shipped on joint account; or if, after looking at or agreeing to take an interest in stock purchased by any one of them before delivered at

said place, it was to be shipped on joint account and the parties to share in the profits and losses, such facts or agreements did not constitute them general partners, but only partners in each transaction."

From *Valentine v. Hickie*, 39 O. S. 19; *Bank v. Sawyer*, 38 O. S. 339; *Peterson v. Roach*, 32 O. S. 374.

Joint purchasers of land to be disposed of for joint profits are partners. 40 O. S. 233.

No. 578. Ostensible partner.—You are instructed that a person, even though he has no interest in the business but who allows his name to be continued as an ostensible member of the firm, may be presumed to give credit to the business, and will to the extent that third persons are induced to trust the firm on the faith of his being a member, he will as to such third persons be estopped from denying that he is a member of the firm, and he will be held by the use of his name to have represented that he was one of the firm, and will be so held to be a member.¹ But to hold one who has so allowed his name to be connected with the firm of which he is not a member, it must appear that the creditor relied on such conduct, and dealt with the firm on the faith of such party being a member.²

¹ *Speer v. Bishop*, 24 O. S. 598; *Story on Part.*, Sec. 64; *Jenkins v. Crane*, 54 Wis. 253.

² *Cook v. P. S. Co.*, 36 O. S. 135.

No. 579. Partnership — Right of surviving partner to wind up firm.—Gentlemen of the jury: It is the right and duty of the surviving partner to wind up a firm by the collecting of assets, selling property on hand, paying debts, and striking balances. He can sue the estate of his deceased partner for any amount he finds due to him on such settlement.

The burden is on him to show to you that the balance he claims is the correct amount.

To determine this requires a knowledge of the agreement of division of profits or losses. You will have to determine this agreement.

The rules governing this question are that the partnership articles, if the firm continues longer than the time limited in the articles, are presumed to fix the terms of the continuation of the firm, just as much as those of the original firm.

Clement Bates, Judge, in Burgoyne, Admr., v. Moore, 51 O. S. 626. Judgments affirmed.

No. 580. Partnership — Articles of — Alterations of as evidenced by entries in books.—Written contracts may be changed by later oral contracts; and on this principle the partners may by mutual consent alter any part of the partnership articles. And this may be done by unanimous assent without spoken words. Hence the books of the firm showing any different arrangement of division of profits and losses, or in any way inconsistent with the articles, the books will control the articles. That is, the agreement of partnership may vary at different intervals. The articles settle what it was on the first day, and presumably it continues the same as then unless the books or proved agreement have changed the articles. The books of a firm are presumed to be the act of all the partners where all had access to them. Whether the plaintiff saw them is of no consequence, since he is not complaining of them. M. is bound by the books because they were made under his control or direction. After the death of M. the subsequent entries do not bind his estate. From that time on entries are the entries of Mr. A. alone, and are his private accounts, not binding upon M. except so far as proved by other testimony than themselves. And if at different periods the entries in the partnership books show a change in the proportion of the profits or losses which each partner was to have, such entries will determine each one's proportion."

"2. If in the several balancing of said books and rendering of statements copied therefrom, the bad, delinquent, and suspended accounts appear as a part of the assets of the firm, then the said defendant is not exempt from making good M.'s share of those accounts by reason of this statement and balancing of the books."

"3. If the agreement and the books show an understanding between the parties as to their rights in the business, the jury are to carry that agreement out, and statements by counsel as to the consequences upon either can not be considered by them, as no such questions are involved, nor is there any evidence upon the subject."

Clement L. Bates, Judge, in *Burgoyne, Admr., v. Moore*, 51 O. S. 626.

PERJURY.

No. 581. Defined.—The statute—Whoever, either verbally or in writing, on oath lawfully administered, willfully and corruptly states a falsehood as to any material matter, in a proceeding before any court, tribunal, or officer created by law, or in any matter in relation to which an oath is authorized by law is guilty of perjury.

R. S., Sec. 6897.

No. 582. As to materiality.—To constitute perjury the statute requires that the fact or facts sworn to if false shall be a material matter, and it is important, therefore, that you understand what is meant by material matter. The false swearing may be to the fact which is immediately in issue, or to any material circumstance which legitimately tends to prove or disprove such fact; or to any circumstance which has the effect to strengthen and corroborate the testimony upon the main fact, or which affects the credit of the witnesses giving testimony.¹ It is sufficient if it is material to any inquiry or question arising upon the trial, such as, if true, might properly influence the court in any matter affecting the rights of the parties. It must tend to directly or circumstantially affect the probability or improbability of any inquiry to be determined.²

¹ *Dilcher v. State*, 39 O. S. 133. A witness may be guilty of perjury in respect to false swearing concerning a mere circumstance. ³ *Russell on Crimes*, 121. False testimony which only serves to explain the knowledge of the witness. *Bishop's Cr. Law*, Secs. 1034, 1037.

² *Com. v. Grant*, 116 Mass. 17; *Jacobs v. State*, 4 Am. Cr. 465; *Hawley's Cr. Law*, 247; *Clark's Cr. Law*, 334. Sufficient if material to a collateral inquiry. *State v. Shupe*, 16 Ia. 36.

No. 583. Willfully and corruptly—Meaning of.—Before you can find the defendant guilty you must be satisfied beyond a reasonable doubt that he willfully and corruptly falsely swore to the matters charged. It must appear that the false oath, if it be false, was taken with some degree of deliberation, or that it was taken without any knowledge. By willfully and corruptly is meant that the defendant has intentionally sworn to a falsehood. If the jury find that the testimony was false, still you must be satisfied beyond a reasonable doubt that the defendant knew it to be false, or that

he did not have any knowledge on the subject, or that he had good reason to believe it to be false.¹

If you find that the intention to swear falsely did not exist, or that he believed that he was telling the truth, and you find that such belief was an honest belief, and he had reasonable grounds for his belief, then you must acquit the defendant.²

Or if you find that the testimony was inadvertently given, or under a mistaken knowledge of the facts, the defendant is not guilty.³

¹ Hawley's Cr. Law, 249; Clark's Cr. Law, 332.

² 36 N. Y. 434; Silner v. State, 17 O. 365; 22 O. S. 477.

³ Hawley's Cr. Law, 249.

No. 584. Oath lawfully administered.—Before you can find the defendant guilty of the crime of perjury you must be satisfied beyond a reasonable doubt that the oath was administered to him in a lawful manner, and by some lawfully authorized officer, and that the oath must be one that is required by law. If the officer administering the oath is not authorized to administer the oath, the oath is not lawfully administered, and perjury can not be predicated thereon;¹ and if the officer administers an oath not warranted by law he acts not as an officer, and false swearing in such case would not be perjury.²

¹ State v. Jackson, 36 O. S. 281.

² Willis v. Patterson, Tapp. 324; Beecher v. Anderson, 45 Mich. 543; People v. Garge, 26 Mich. 30.

No. 585. Perjury by assignor in examination before probate judge.—By the statute of Ohio it is provided that "The probate judge may, on the application of the assignee, or of any creditor, or without any application, at all times require the assignor, upon reasonable notice, to attend and to submit to an examination on oath upon all matters relating to the disposal of his property, to his trade and dealings with others, and his accounts concerning the same, to all debts due or claimed from him, and to all other matters concerning his property and estate, and the due settlement thereof according to law."

And now, gentlemen, if you find from the evidence that said defendant was required to, and did, attend and submit to an examination under oath, as charged in the indictment herein, such an examination would be a proceeding before an officer created by law, and if the said defendant, on oath lawfully administered, willfully, corruptly stated a falsehood

as to any material matter on said examination he would be guilty of perjury in so doing. . . .

If you find from the evidence in this case that the paper introduced in evidence was executed by the defendant and duly filed in the office of the probate court, and that E. V. duly qualified as assignee as therein named, such proceeding would authorize the examination of the defendant as to the property owned by him.

As to the materiality of the testimony it is sufficient if it is material to any question arising upon the trial or hearing, and such as, if true, might properly influence the officer before whom the investigation is being heard in any matter affecting the rights of the parties.

If you find from the evidence that the defendant, as assignor, was being examined, under oath duly administered, before C. R. G., probate judge of — County, in the proceeding such as has been stated to you, that it became material to know where the goods of said assignor were; if there were any such goods, and his testimony as to where the property was, was the material matter in said investigation.

The materiality of the testimony depends upon whether, if true, it would probably influence the action of the judge in any matter affecting the rights of the parties to that proceeding. But if you find from the testimony that the alleged testimony could not properly influence the action of the judge in any matter affecting the right of the parties to that proceeding, then it is wholly immaterial whether it was true or false.

Statements believed to be true.

You are instructed that false swearing under an honest belief that statements are true is not perjury, still the jury are to determine from all the evidence in the case whether such honest belief existed; and if the jury believe from the evidence, beyond a reasonable doubt, that the defendant swore falsely as charged, and that he had no reasonable grounds for believing his statements to be true, and did not honestly and in good faith believe them to be true, then he is guilty of perjury.

If the jury find that the defendant testified as stated in the indictment, and that his testimony was false, still if you have a reasonable doubt whether the defendant knowingly and willfully testified falsely in giving such testimony, the jury should find the defendant not guilty.

Nye, Judge, in *State v. Berk*, Summit County Common Pleas. Affirmed by Circuit and Supreme Courts.

No. 586. Proof required—More than one witness—Corroborative.—You are instructed that the fact that the defendant has sworn falsely can not be established by the testimony of one witness, that the law regards the oath of the defendant as the testimony of one credible witness in his favor, and sufficient to countervail the testimony of one witness swearing positively in contradiction of his oath, so that the testimony of the defendant and the one witness against him would, if the jury regarded the defendant as a credible witness, leave the evidence evenly balanced; and before the defendant can be convicted the state must furnish corroborative evidence of more than the one witness L. D., or the testimony of one witness and other proofs corroborating such witness.

The corroborative evidence need not be of sufficient force to equal the positive testimony of another witness, or such as would require the jury to convict in a case in which a single witness is sufficient, but that it must be such as gives a preponderance to the evidence in favor of the state. In consideration of the evidence the jury should keep this rule in view in determining whether the false swearing has been proven, and if the state has failed to prove the false swearing beyond a reasonable doubt, the defendant should be acquitted.

Approved in *Crusen v. State*, 10 Ohio, 259.

RAPE, AND ASSAULTS TO COMMIT.

No. 587. The statute—Defined.—The statute in this state provides that: Whoever has carnal knowledge of a female person forcibly and against her will, or, being eighteen years of age, carnally knows and abuses a female person under sixteen years of age, with her consent, is guilty of rape.

R. S., Sec. 6816; 91 O. L. 61.

Rape is defined to be the having of unlawful and carnal knowledge of a woman by force and against her will. *Williams v. State*, 4 Oh. 227.

No. 588. Consent of female.—The jury are instructed that before you can find the defendant guilty, you must be satisfied beyond a reasonable doubt that carnal knowledge was had against or without the consent of the female. Carnal knowledge with consent is not rape, unless the female person

is under sixteen years of age. It is not necessary that want of consent be shown by actual manual resistance, but it must be shown that the consent be given by the female person as a rational and intelligent person. If you find that the defendant had carnal knowledge of the female while she was so drunk as to be unconscious, it is in law having carnal knowledge against her consent; or if the woman is insane, or an imbecile, or asleep, it is against her consent; or if her consent was obtained by threats and fear of bodily harm, although there is no actual violence, it is against her consent.¹

As the law now stands it is not material whether consent has been given by a female under sixteen years or not, as the statute makes it rape where a male eighteen years of age carnally knows and abuses a female person under sixteen years of age, with her consent. It is now rape to have intercourse with a female under sixteen years with or without her consent.²

¹ Clark's Cr. Law, 186-88.

By threats, *Miller v. People*, 42 Mich. 262; *Dickerson v. State*, 40 N. E. 667 Ind.; *Hawkins v. State*, 136 Ind. 630; *Monroe v. State*, 71 Miss. 196.

² 920, L. 54.

No. 589. Carnal knowledge complete, when.—The jury are instructed that carnal knowledge or sexual intercourse is complete upon proof of penetration.¹

The offense is complete if there be penetration only without emission (*emissio seminis*), nor is it necessary that penetration be full and complete, but the slightest penetration of the male organ into the female organ will constitute carnal knowledge within the meaning of the law.²

Before you can find the defendant guilty of rape, you must be satisfied beyond a reasonable doubt that there was some penetration of the male organ of the defendant into the female organ of the prosecutrix.³

¹ R. S., Sec. 7297. This section does not enlarge the meaning of the statutory provision in relation to rape as to include persons not before amenable. 35 O. S. 52.

² *Williams v. State*, 20 Fla. 777; 5 Am. Cr. 612. See *Blackburn v. State*, 22 O. S. 102.

³ *Massey v. State*, 20 S. W. 758.

No. 590. Capacity—Burden of proof where accused under fourteen years of age.—If it be found that the accused had sexual intercourse with the child, in the manner stated in the indictment, but that he was, at the time, under fourteen years of age, the burden was on the state to show that he was capable of emitting semen; and the weight which

should be given to the evidence, tending to prove or disprove such capacity, is for the consideration of the jury." ¹

It is left entirely for the jury to say from the evidence whether or not the defendant was matured sufficiently and had the physical capacity to commit the act. If you find that the defendant was under fourteen years of age, the law presumes him incapable of committing rape; you are instructed that you can not convict him unless it is proven beyond a reasonable doubt that he has arrived at the age of puberty, and is capable of emission and consummating the crime. ²

¹ From *Hiltabiddle v. The State*, 35 O. S. 52. The charge above given is not taken from the charge of the lower court, but was suggested by the Supreme Court as being the proper instruction to the jury under the circumstances.

² *Williams v. State*, 14 O. 227-8. The statute, 7297, does not change this. 35 O. S. 52. *Wagoner v. State*, 2 Lea, 352; *Gordon v. State*, 93 Ga. 531.

No. 591. Evidence as to the character of the woman.—Evidence has been admitted reflecting upon the character of the woman, and the purpose of the law in admitting such testimony should be explained to you. You are instructed as matter of law that the character of the woman, granting that she is a lewd woman, is no defense to the charge, as rape may be committed against a prostitute as well as against a virtuous female. ¹ You are permitted to look to the testimony as to the character of the woman only as a mere circumstance in the case, for the purpose of assisting you in determining whether she has told the truth about the matter, and as reflecting upon the question as to whether or not the intercourse was voluntary on her part, or without her consent. You must consider this evidence with all the other proof offered in the case. ²

¹ *Anderson v. State*, 104 Ind. 467.

² *People v. Crego*, 70 Mich. 319; *Carney v. State*, 118 Ind. 525; *State v. Reed*, 39 Vt. 417; *Pefferling v. State*, 50 Tex. 486.

No. 592. Resistance — Evidence.—You are instructed that the want of consent and actual penetration are both essential to the crime of rape, and you must be satisfied beyond a reasonable doubt that there was both want of consent and actual penetration before the defendant can be found guilty of the charge. The prosecutrix is bound to resist, unless manual resistance be overcome by fear or threats. The want of consent may be shown by the testimony of the prosecutrix, but this alone without some corroboration is not sufficient; it must appear that she made some resistance, and her testimony may be corroborated by her subsequent con-

duct, excitement, the condition of her clothes, whether torn, outcries, medical testimony as to the condition of the hymen.

People v. Terwillinger, 26 N. Y. S. 674; *Richards v. State*, 36 Neb. 17; *People v. Kunz*, 27 N. Y. S. 945; *State v. Connelly*, 59 N. W. 499; *Richards v. State*, 53 N. W. 1027. Walking together not sufficient. *State v. Chapman*, 55 N. W. 489 (Ia.). Fear of disclosing may render corroboration unnecessary, 111 Mo. 569. In *People v. Wessel*, 33 Pac. 216 (Cal.), the jury were charged "while it is the law that the testimony of the prosecutrix should be scanned, still this does not mean that such evidence is never sufficient to convict, and if you believe the prosecutrix it is your duty to render a verdict accordingly."

The jury may properly be charged that if they believe that, at the time of the alleged rape, the prosecuting witness made no outcry, and did not complain to others, but concealed the fact for a considerable length of time, that they may take this into account in determining whether a rape was in fact committed or not. *Territory v. Edie*, 30 Pac. 851.

If the jury believe that the defendant had sexual intercourse with the prosecutrix, and she did not make the utmost resistance to prevent it, still the defendant may be found guilty provided the jury believe that the defendant threatened to use force and do her great bodily injury in case she did not submit through fear of such injury. *Id.*; 30 Pac. 851.

No. 593. Assault with intent to commit rape.—The statute of Ohio provides that "whoever has carnal knowledge of a female person forcibly and against her will is guilty of rape." Rape is defined to be the unlawful carnal knowledge of a woman by force and against her will. There are three things, then, necessary to constitute the offense of rape. 1. There must be carnal knowledge of a female person. 2. The act must be done forcibly. 3. It must be done against the will of the female person.

If you find, then, from the evidence that the defendant committed an assault upon the person of the said L., it will become necessary for you to determine with what intent he committed said assault. Did said defendant commit said assault with intent to have sexual intercourse with said L., forcibly and against her will? And before the state would be entitled to a verdict of guilty against the defendant for the crime of assault with intent to commit rape, you must further find from the evidence that at the time he so assaulted the said L., he intended to have sexual intercourse with her forcibly and against her will. It is not necessary, to constitute the crime of assault with intent to commit a rape, that the defendant should have actually had sexual intercourse with the prosecuting witness L. The offense is complete under our statute if the defendant assaulted her with the intent to have sexual intercourse with her forcibly and against her will.

Nye, Judge, in *State v. Hughes*, Lorain County Common Pleas.

To constitute an assault with intent to commit a rape, the man's purpose must be to use force, should it be necessary, to overcome the woman's will. *Bishop's Criminal Law*. It is not enough merely to solicit her, however urgently, to consent to a carnal connection. *Ibid.*

No. 594. Same continued—Force—Consent, etc.—The allegation of force, in the absence of previous consent, is proved by any competent evidence, showing that either the person of the woman was violated, and her resistance overcome by physical force or that her will was overcome by fear or by duress. In either case the crime would be complete, though she ceased all resistance before the act itself was actually consummated. Where a female submits to sexual intercourse through fear of personal violence, and to avoid the infliction of great personal injury upon herself, then such carnal intercourse would not be with such consent as would justify the act upon the part of the man accused.

To sustain a conviction upon an indictment for assault with intent to commit rape, the testimony must show not only that the accused had a purpose at the time of the assault to have sexual intercourse with the prosecuting witness, but also that he intended to use whatever degree of force might be necessary to enable him to overcome her resistance, and accomplish his purpose.

You are instructed that if the defendant made an approach towards the prosecuting witness with intent to procure her consent to have sexual intercourse with her, and if she refused, he abandoned the purpose, such act would not constitute an assault with intent to commit a rape. But if you find from the evidence that the defendant made an assault upon the prosecuting witness with intent to use such physical force and threats as would overcome her will and compel her to submit to his desires to have sexual intercourse with him, such act would constitute an assault with intent to commit a rape.

Nye, Judge, in *State v. Hughs*, Lorain County Common Pleas.

For definition of attempt, see *Bishop's Criminal Law*, Sec. 728 et seq. If after an assault with intent to ravish, the woman who had resisted yields voluntarily, so that there is no rape, the offense of assault with intent to commit rape remains. 12 Ia. 66; 50 Ia. 189.

No. 595. Same continued—Declarations of prosecuting witness as evidence.—Testimony has been offered by the state and permitted to be given to you of the declarations made by L., the prosecuting witness, to her aunt, and to her mother soon after the alleged offense. In a case of this kind the declaration of the injured female made immediately or soon after the alleged offense, are competent testimony, provided the female has first been examined in court. They are competent not for the purpose of proving the commission of the offense, but as corroborative of or contradictory to her statement made in court.

Nye, Judge, in *State v. Hughs*, Lorain County (Ohio) Common Pleas.

This instruction is based on *Johnson v. State*, 17 Ohio, 593; *Laughlin v. State*, 18 Ohio 99.

ROBBERY.

No. 596. Robbery and conspiracy—Preliminary questions—Plea—Presumption of innocence.—After stating what the material allegations in the indictment are, it may then be charged as follows:

To this indictment the defendant has entered a plea of not guilty, and puts in issue every allegation and averment in the indictment which it is necessary for the state to make out to prove its case.

The law presumes that the defendant is innocent, and that presumption goes with him and abides by him through all the stages of the trial, until the state shall have produced evidence that will satisfy you of his guilt to a degree of certainty known in law as beyond a reasonable doubt. The term reasonable doubt will be explained to you hereafter.

Nye, Judge, in *State v. Dedrick*, Lorain County, O.

No. 597. Robbery defined.—Robbery is thus defined by statute in Ohio: "Whoever by force or violence or by putting in fear steals or takes from the person of another anything of value, is guilty of robbery."¹

There are four things that are essential to constitute the crime of robbery. First, There must be a taking of the goods or property of some value. Second, That the property was taken with a felonious intent, or with an intent to steal. Third, That it must be taken from the person of the party robbed, or from his presence or immediate control. Fourth, That the property was taken by force, or violence or by putting in fear. And before the state would be entitled to a verdict of guilty against the defendant, it must establish each of the foregoing propositions by evidence which satisfies your minds of their proof beyond a reasonable doubt.²

¹ R. S., Sec. 6818.

² Nye, Judge, in *State v. Dedrick*, Lorain County Common Pleas.

No. 598. Robbery—Material allegations to be proved.—The material allegations of the indictment and the things which are necessary for the state to prove before it is entitled to a conviction at your hands, are as follows: First, That the robbery was committed. Second, That said offense was committed within the County of —, in the State of —. Third,

That the defendant (naming him) committed the offense. Fourth, That it was done on or about the — day of — 18—. You are instructed, however, that the exact date is not material. If you should find that the offense was committed on or about that day, near to that time, that would be sufficient so far as the date is concerned. It is the transaction that is material.

From *State v. Dedrick*, Lorain County Common Pleas. Nye, Judge. R. S., Sec. 6818.

No. 599. Robbery also includes assault and battery.—The offense charged in this indictment (robbery) includes also the crime of assault and battery. Hence if you find that the defendant is not guilty of the crime of robbery, but is guilty of assault and battery, then you may return a verdict for assault and battery. It may be well, therefore, to state to you what is meant by assault and battery.

An assault is any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to the human being.¹

Again, an assault is an intentional attempt by force to do an injury to the person of another.² A battery is committed when the violence menaced in the assault is actually done, in ever so small a degree, upon the person. A battery, therefore, includes an assault, though an assault does not necessarily imply a battery.

The slightest touching of another in an angry, rude or insolent manner is a battery.³

¹ 2 Bishop's Crim. Law, Sec. 72.

² 3 Greenleaf's Ev., Sec. 39.

³ Nye, Judge, in *State v. Dedrick*, Lorain County Common Pleas.

No. 600. The taking.—The jury are instructed that "in order to consummate the offense (of robbery) it is not necessary that the property should be actually taken from the person of R. M., the individual named in the indictment. It is enough if the property was in his presence and under his immediate control, and he was put in fear by the defendant, and whilst the property was so in his presence, and under his immediate control; and he laboring under such fear, the property was taken by the defendant."¹

(1) *Proof as to money taken.*

I say to you as matter of law if you can find from the evidence that the accused unlawfully and feloniously took

¹ *Turner v. State*, 1 O. S. 424 and cases cited; Bishop's Cr. Law, Sec. 975; Wharton's Cr. Law, Sec. 1696.

money to the amount and value of — dollars, or a less sum, the property of H. N., from the person of the said H. N., the proof will be sufficient as to the kind of money taken, although the proof does not show what kind of money was taken, or that it was issued by lawful authority.

(2) *Felonious intent.*

Again, the taking must be proved to have been with felonious intent. If you find that the defendant took the money charged in the indictment, or any part of it, you must further find that he took it with the intent to unlawfully convert or appropriate it to his own use.²

(3) *The force or violence.*

The force or violence used in taking the money may be actual or constructive. If you find from the evidence that the power of the owner to retain possession of his property was overcome by the defendant, either by actual violence, physically applied, or by putting him in such fear as to overpower his will, that would be sufficient force or violence under our statute. You are also instructed that the money or goods obtained from the owner by putting him in fear will support the allegation that they were taken by force. The fear may be of an injury to the person, or to the property, and the circumstances must be such as to indicate a felonious intent on the part of the prisoner.³

² Intent must be charged and proved. 10 O. S. 575; 4 O. S. 540.

³ Nye, Judge, in *State v. Dedrick*, Lorain County Common Pleas; see 3 Greenleaf's Ev., Sec. 231.

No. 601. Same continued—Where there is a conspiracy.—Now, to apply these principles of law to the present case. If you find from the evidence that the defendant here on trial and others combined or agreed among themselves to commit an assault upon the person of H. N. with the intent to rob him, and in pursuance of that combination or agreement this defendant was present, aiding, abetting, or encouraging said assault, and that this defendant, or such other persons as have made such combination or agreement, carried out the purpose of said combination and agreement and committed the offense agreed upon the person of said H. N., all who were present aiding, abetting, and encouraging said unlawful purpose would be guilty of the act there done.

Again, if you find from the evidence in this case that the defendant here on trial and one or more other persons combined or agreed among themselves to commit an assault upon and rob H. N., and that, in pursuance of said combination or agreement, said persons did assault and rob H. N. as charged

in the indictment of all such persons who were present, aiding, abetting, and encouraging, would be guilty of the offense thus agreed upon and committed, and this defendant was a member of said agreement and combination, and was present, aiding, abetting, and encouraging in said robbery, he would be guilty of the crime there committed. It is not necessary that the defendant on trial, himself actually assaulted and robbed H. N. (if you find that he was assaulted and robbed), because if you find that the defendant was a member of the combination and agreement, that some other person or persons did themselves in fact assault and rob H. N., in pursuance of such agreement or combination for that purpose, and the defendant here was present, aiding, abetting, and encouraging the act, then he would be guilty.

Nye, Judge, in *State v. Dedrick*, Lorain County Common Pleas.

No. 602. Same continued—Conspiracy in the commission of robbery.—It is claimed by the state that the defendant, C. D., here on trial, and others united in the common purpose of robbing H. N., and that said purpose was carried into execution. Such a common purpose is in law called a conspiracy.

This defendant denies that he had any such purpose or intent, and denies that he, or he with others, assaulted H. N. with the intention of robbing him, or with any other intention, and denies that he, or he with others, took any money, goods, or property from the said H. N. Now you are instructed as a matter of law that: "When several persons unite to accomplish a particular object, whether they collectedly put each his individual hand to the work, or one doing it, the others lent the aid of their wills, not in the way of mere pacific desire, but of active co-operation, the persons thus uniting are all and several responsible for what is done."

1 Bishop's Crim. Law: "If several, combining both in intent and in act, commit a crime jointly, each is guilty the same as if he had done the whole crime." 1 Bishop's Crim. Law, Sec. 630, and, "all who by their presence countenance, or encourage in the commission of the crime, are liable as principal actors." 1 Bishop's Crim. Law, Sec. 632. But, "if two or more persons are lawfully together and any one of them commits a crime without the concurrence of the others, the rest are not thereby involved in the guilt." 1 Bishop's Cr. Law, 634. And, "if two or more persons are unlawfully together, and one of them commits a crime without the concurrence of the others, the rest are not thereby guilty." "Also if several persons are by a concurrent understanding in the actual perpetration of the crime, and one of them, of his sole volition, and not in pursuance of the main purpose, does another criminal thing which is in no way connected with what was mutually contemplated, he alone is liable."

No. 603. Same continued—Character of evidence essential to prove conspiracy.—The combination or conspiracy may be shown either by direct testimony or by circumstances and conduct.

Evidence in the proof of the conspiracy will generally, from the nature of the case, be circumstantial.¹ Though common design is the essence of the charge, it is not necessary to prove that the defendant "and others" came together and actually agreed in terms to have that design and to pursue it by common means. If it is proved that the defendant "and others" pursued by their acts the same object, by the same means, one performing one part, and another, another part of the same, so as to complete it with a view of the attainment of the same object, the jury would consider such evidence to determine whether all were engaged in the conspiracy to effect that object.

But, if the defendant was present when H. N. was assaulted and robbed (if such you find to be a fact), and the offense was committed without any agreement or combination with him, and without his knowledge and consent, then he would not be guilty, unless he take some part in the assault and robbery. The mere presence of the defendant when the assault and robbery was committed upon H. N. would not make him guilty.

If you find from the evidence that the defendant here on trial and others were at the place of the alleged offense, and that the defendant and others with whom he was associated were there engaged in a common purpose of robbing H. N., and that, in pursuance of said engagement, the said H. N. was in fact robbed, then all who were there, aiding, abetting, and encouraging in said common purpose would be guilty of the offense there committed in pursuance of said common purpose.²

¹ 3 Greenleaf's Ev., Sec. 93.

² Nyc. Judge, in *State v. Dedrick*, Lorain Common Pleas.

No. 604. Same continued—Liability independent of conspiracy.—But, gentlemen of the jury, independent of any combination or agreement, if you find from the evidence that has been given to you that the defendant made an assault on H. N., and took from him by force or violence, or by putting in fear, as has been heretofore explained to you (ante, No. 597) any money of any value, then he would be guilty of his own acts. Every person is responsible for his own acts, and if there was no agreement between the defendant and any other person, or persons, he would be individually responsible

for all that he did on that day, if you can find that he did anything.

From Nye, Judge, in *State v. Dedrick*.

No. 605. Robbery—Assault with intent to rob—Violence concomitant with the taking.—The jury are instructed that the crime of robbery can not be committed unless there has been some force or violence, or putting the person alleged to have been robbed in fear. The offense may be committed by putting in fear without any force or violence, or without putting in fear, but by force or violence. There being no putting in fear, violence is then an essential ingredient in the crime. Violence, in order to constitute an assault with an intent to rob, must be concomitant with, and not subsequent to, the attempt to take the property. If you find that the accused had abandoned his attempt to take the property, and there was a struggle in order to avoid arrest, however violent this struggle may have been, it did not characterize the act as an attempt to rob.

Hanson v. State, 43 O. S. 376.

SALES—WARRANTY.

No. 606. Sales—When complete.—"All that is necessary to pass property is that the buyer and seller agree. If one who has a long course of dealing with another have a correspondence in regard to certain specific property, nearer to the purchaser than to the seller, and more properly, by reason of their business relations, in the control of the purchaser, and they agree, one to buy and the other to sell, the sale is complete just as soon as they agree, and the seller charges the buyer, and the buyer credits their respective books with the price of the property."

From *Robinson v. N. H. L.*, 6 Neb. 328, 332.

No. 607. Sale—What constitutes—Replevin of goods from assignee.—The rights of the parties in this case depend upon whether or not there was a valid consummated sale by K. to H.; a sale is not consummated simply by transmitting the possession of the goods from the seller to the purchaser; there must have been another condition, namely, title of goods; the right of the property therein must also have passed

from the seller to the buyer; unless this ownership of the goods, as well as the possession thereof, passed from the vendor to the vendee, there was no consummated sale and the ownership remains in the vendor. Whether or not the title to the right of the property, the ownership of the goods passed, depends upon the existence of a legal valid contract of sale made between the vendor and the vendee; for although possession may be transferred by exchange from one to another, yet title and ownership changes only by the operation of the law, through the medium of the valid contract; a valid contract being an avenue through which ownership can pass.

An invalid or fraudulent contract will not be recognized by the law as of any potency, or as a means to carry the right of ownership from one to another. . . . Where a sale is made for cash, the goods being delivered simultaneously with the payment of the price, both seller and buyer in that instance has received what he bargained for, the one giving the goods and the other receiving their equivalent in cash, so that each has all the benefit which can accrue to him from sale, and each has performed every obligation which his duty under the sale requires; the contract is complete and valid, and title to possession has passed.

Wright, Judge, in *Knight & Co. v. Hopkins*, Hamilton County Common Pleas. *Talcott v. Henderson*, 30 O. S. 162.

No. 608. Same continued—Sale on credit.—But in the case of sales made upon credit the conditions are different; there no cash passes from buyer to seller, although possession of the goods is given; the seller relies not on the equivalent in value already received, but trusts to obtain it in the future. This trust is based upon and grows out of those things which influence the mind of the seller at the time he parted with his goods; and if the statements or conduct of the buyer were things which influenced the mind of the seller in giving the credit, then his statements and conduct must be fair and true, because if they are false and fraudulent, and the seller has relied upon that which does not exist, there can be in that case no mutual understanding or contract which can serve the principles of transferring title and ownership; there is no valid contract of sale, the ownership remains still in the original proprietor and he may take the goods back, even though the other has possession thereof. . . .

In sales upon credit the mere fact that the seller has gotten a bad bargain, or is mistaken in what he thought was the buyer's financial responsibility does not at all entitle him to rescind the sale. If the vendor sells on credit and merely

takes his chances then he has bargained for nothing which he has not gotten, and the sale stands, although the buyer never pays. It is only where the seller is misled by the buyer, and is induced to give credit by a false belief which is occasioned by the acts and representations of the buyer that he can rescind the sale and recover back his goods. . . .

If the vendor merely takes his chances and is not influenced by the conduct or statements of the vendee, then the sale is valid, and he has no right to replevin the goods; but on the contrary if credit was given on account of misrepresentations made by the vendee, and it turns out that all such representations were the cause of inducing the sale, and they were false and fraudulent, then the sale is invalid and the title does not pass, and they may recover back their goods.

Wright, Judge, in *Knight & Co. v. Hopkins*, Hamilton County Common Pleas. See ante, No. 207. *Fraud. Talcott v. Henderson*, 30 O. S. 162.

No. 609. Sales—Representations as to financial condition invalidating.—Where a buyer although he makes no statements whatever as to his financial condition, and is not called upon to make any such statement, but intends at the time of making such purchase not to pay for the goods, this will invalidate the sale. Such conduct amounts to a misrepresentation, because when a man goes to buy, a mere offer or attempt to buy carries with it the inference that the proposed buyer intends to pay for what he is buying whether he expressly promises or not; but if, in fact, he intends not to pay, then his conduct in offering to buy, which indicates an intention to pay, is false, and inasmuch as the seller would not have sold had he known that the buyer did not intend to pay, he has been influenced by a false belief induced by the buyer, the buyer's conduct is fraudulent, and the sale is void.

But in this connection the fact that the buyer is insolvent and does not disclose his insolvency to the seller does not necessarily prove that he intended not to pay when he purchased the goods. What his intention was is for you to determine from all the evidence; intention is the condition of the mind, intangible, invisible, and consequently incapable of direct, positive proof, unless there appears from some outward expressions, but must generally be arrived at by a consideration of the situation, surroundings, and circumstances in which the person whose intention is in question is found. And as a rule of proof in such cases, found by experience to be just and wise, the law presumes that reasonable persons anticipate the ordinary and probable consequences of known conditions and consequences; hence if a purchaser of goods

has knowledge of his own insolvency, and knows that he will be unable to pay for the goods, his intention not to pay should be presumed. But if the purchaser does, in fact, intend to pay, and has reasonable expectations to pay, then the presumption does not arise, and the sale is valid, even though he be insolvent and knows it and does not disclose it. Fraud is never presumed, and the burden of proving its existence is always upon him who alleges it.

Wright, Judge, in *King & Co. v. Hopkins*, assignee, Hamilton County Common Pleas. See ante, No. 207. *Fraud. Talcott v. Henderson*, 30 O. S. 162.

No. 610. What language constitutes warranty in sales.—“If during the negotiation for the sale of the horse, the defendant made an assertion of soundness, which assertion was intended to cause the sale of the horse, and was operative or effectual in causing such sale, then such assertion would constitute a warranty. But a mere expression of an opinion is not enough to constitute a warranty.”¹

(a) *Implied warranty that goods are fit for purpose sold.*

The jury are instructed that where a person sells goods for a specific purpose, with knowledge that the purchaser is getting them for that special purpose, such purchaser has a right to expect that they will answer that purpose, and when the vendor so sells them, with full knowledge of what use the vendee expects to make of them, the law is that the vendor impliedly undertakes with and warrants to the purchaser that the goods are fit for the use intended, and if it turns out that they are not fit for such use, there is a breach of warranty.²

¹ From *Little v. Woodworth*, 8 Neb. 283. The court held in this case that no particular form or set of words are necessary to constitute a warranty, but that any form of words will be sufficient.

² *Byers v. Chapin*, 28 O. S. 399. See *L. R. 2 Q. B. D. 162*; *Wilson v. Lawrence*, 139 Mass. 346. The particular purpose must be made known by the vendee if he desires to place upon the seller the responsibilities flowing from an implied warranty. *Hight v. Bacon*, 126 Mass. 13. If the buyer relies upon himself there is no warranty. *Mattoon v. Rice*, 102 Mass. 236.

No. 611. Implied warranty.—The jury are instructed as matter of law that in sales of personal property, in the absence of an express warranty, where the buyer has an opportunity to inspect the goods or article, and the seller is guilty of no fraud, and is not the manufacturer or grower of the article he sells, the maxim of *caveat emptor* applies.¹ By that we mean that the purchaser must take care that there are no defects. The purchaser buys at his own risk. This

¹ *Barnard v. Kellogg*, 10 Wall. 358.

he does unless, as stated, there are present any of the facts just stated, an express warranty, or unless the circumstances of the case are such that the law will imply a warranty.²

An implied warranty is one which the law implies from the circumstances of the case, and is really founded upon the presumed intention of the parties. The implication which the law draws from what must obviously have been the intention of the parties, with the object of giving efficacy to the transaction and preventing a failure of consideration as can not have been within the contemplation of either side.

If the jury are satisfied from a preponderance of the evidence that the defendants engaged, for a reasonable or valid consideration, to build them three boilers to run the engines for their rolling-mill, and agreed to build them, they, the defendants, impliedly agreed that the boilers should be built of good materials and good workmanship; and should be free from all such defects of material and workmanship, whether such defects are latent or otherwise, as would render them unfit for the usual purposes of such boilers.³

² Story on Sales (3d ed.), Sec. 348; 20 Johns, 196.

³ Rodgers v. Niles, 11 O. S. 48.

No. 612. Recoupment of damages where vendee has used property under warranty as to quality.—The jury are instructed that if you find that there was a breach of warranty as to quality of the goods under the instructions given you on that point, the defendant may do one of two things. He may entirely rescind the contract of sale, return the goods, or offer to return them, or retain the goods without offering to return them, and in a suit for the price recover any damages he may have sustained by reason of the breach of warranty. He may recover damages for the difference in value of the goods actually received by him and the value of goods had they been of the quality and grade represented and warranted to be, as well as any trouble and expense incurred by reason thereof.

Dayton v. Hoogland, 39 O. S. 671–82 and cases; see 26 O. S. 537–38.

Tender of an animal back is not necessary to recover damages, that is, difference in value. Beresford v. McCune, 1 C. S. C. R. 50.

If there is a false warranty the vendee may rescind the contract for the fraud, and restore the goods within a reasonable time. Nelson v. Martin, 105 Pa. St. 229; Freyman v. Knecht, 78 Pa. St. 144; Sparling v. Marks, 86 Ill. 125.

Or the vendee may retain the goods and rely on the fraud in defense. Cavender v. Roberson, 33 Kan. 626; Carey v. Guillow, 105 Mass. 18; Herfort v. Cramer, 7 Colo. 483, 489.

No. 613. Notice of rescission, when necessary.—The jury are instructed that the law requires a person who desires

to rescind a sale on account of a breach claimed as against the other contracting party, good faith requires that he should give notice of his claim or purpose to rescind whenever his failure so to do would injure the defaulting party; and that if he willfully keeps silent when he ought to speak he will be regarded as waiving such default, or as electing not to rescind.

Leeds v. Simpson, 16 O. S. 321.

No. 614. Sale superinduced by mistake may be rescinded in action for sale when.—The jury are instructed that a contract of sale made under a mistake as to a material fact may be rescinded by the party sought to be charged as the vendee, in an action by the vendor to recover the purchase price from the vendee. The mere fact that the vendee has given a note for the purchase price of the goods sold does not amount to a waiver of such mistake or prevent him from insisting upon the mistake as a defense, unless he had knowledge thereof, or ought to have known of it. It is very clear that a defendant can claim no benefit of a mistake as to what he ought to have known, or could, by reasonable diligence, have found out. If the defendant, at the time of the giving of the note, knew of that fact, or is justly chargeable, under all the circumstances of the case, with a want of reasonable diligence to ascertain it, and to guard against the alleged mistaken belief, the defense on the ground of mistake fails. In determining this matter of the want of reasonable diligence you may look to and consider what the plaintiff said and insisted on in regard to the barrels sold, and you may well consider whether if the plaintiffs themselves entertained the mistaken belief that the barrels were not suitable for oil barrels, if properly glued, and asserted it as a fact, any want of reasonable diligence can justly be imputed to the defendant for having the same mistaken belief.

If the defendant acted solely upon the statements or representations made by the vendor, and the defendant did not have any opportunity to see and inspect the barrels, under such circumstances they can not be charged with want of diligence.

Evers v. Chapin, 28 O. S. 300.

There is no sale if there has been a material mistake as to their identity. *Hawley v. Harris*, 112 Mass. 32. There is no meeting of minds to form a contract if there has been a mistake. 11 Pet. 71; 20 Pick. 139. Nor is there a sale if there be a material misunderstanding as to the price, 40 Cal. 459; 62 Wis. 584; 44 Kan. 277.

No. 615. Sale—Delivery of wheat to mill whether sale.
 —If the evidence satisfies you that it was understood between W., the plaintiff, and J., the miller, that the wheat in controversy was put in the mill to be kept until such time as W. chose to demand redelivery, and that J. agreed to redeliver it to W. upon such demand, the transaction was not a sale of the wheat to J., but the wheat remained the property of W.¹

(a) Effect of mixing with other wheat upon transaction.

“And this character of the transaction is not lost either, even though the custom of the country in reference to which the wheat was received warranted the mixing of it with the wheat of others in the mill, or because it should appear that by the consent of the plaintiff and the miller the wheat was mixed with other wheat in the mill belonging to the miller himself.”

(1) With understanding that miller was to ship or use same on his own account, etc.

“If the jury find that the plaintiff did deposit wheat with J. D. J., at his mill, yet if the jury find that at the time J. received the wheat it was to be and was mixed in a common mass with other wheat in the mill, and with the knowledge or understanding that J. was to retain and use or ship the same, for sale on his own account, at his pleasure, and on demand of the plaintiff was either to pay the market price thereof in money or redeliver the wheat, or other wheat in place of it to the plaintiff, the title of the wheat passed to J., and the plaintiff can not recover in this action.”²

(2) Mixed with consent of owner.

That if the proof shows that the plaintiff's wheat, either with or without his consent, was mixed in a common mass with other wheat in the mill belonging to the miller (or to the miller and other persons who had deposited wheat in the mill), the plaintiff acquired thereby a property in the common mass of wheat equal in quantity to that he had put in the mill.”³

¹ Kinkead's Plg., Sec. 1192; Chase v. Washburn, 1 O. S. 244.

² This was given by request. See Kinkead's Plg., Sec. 1192, where Ohio cases are cited. Chase v. Washburn, 1 O. S. 244, 252; 117 Pa. St. 604; 75 Ia. 267.

³ Kinkead's Plg., Sec. 1192; James v. Plank, 48 O. S. 255. It was a bailment, so that the plaintiff acquired, as in charge stated, property in common mass. Id. “Where the identical goods delivered are to be restored in the same or modified form (as where wheat is to be restored as flour), the property in the goods is not changed; the transaction is a bailment.” 150 U. S. 312, 329; 7 N. Y. 433; 8 Allen, 182.

(b) *Option to demand equal number of bushels of common mass.*

"If the jury find that it was the understanding between the miller and the plaintiff that the plaintiff had the option to demand and receive the return of his own wheat or an equal number of bushels of wheat out of the common stock in the mill belonging to the miller and the depositors, including plaintiff's, or to then elect to sell, then the miller, as to the plaintiff's wheat, was a bailee, and was not the owner."

"If plaintiff delivered wheat at J.'s mill, and the same was mingled with wheat of the miller or other depositors, he, the plaintiff, did not thereby lose his property, but he retained a property in so many bushels of the common mass in the mill as he had put in, notwithstanding that it may have been understood between the miller and the plaintiff that the plaintiff's wheat should be mingled with the miller's wheat and the wheat of other depositors."

"If the understanding between the miller and the plaintiff provided that J. was to redeliver to plaintiff out of the common mass in the mill the number of bushels which he put in the common mass in the mill, and his proportion was still in the common mass, the plaintiff is entitled to a verdict."⁴

⁴ W. Stillwell, Judge, in *Geo. W. Hall v. John Watkins*, S. C., No. 1707.

"Where grain is deposited with a warehouseman, with an understanding that it will be mingled with other similar grain of other parties, and that its equivalent from the common mass will be returned in the same or an altered form, the depositor is a tenant in common *pro rata* with all the other like depositors, and the warehouseman is their common bailee. This is merely the case of an intermixture or confusion of goods with the consent of the owners, and each remains the owner of his share. *Benjamin on Sales*, 5; 46 O. S. 244; 48 O. S. 255; 133 Mass. 154, 160; 117 Pa. St. 589, 603.

No. 616. Sale—Warranty—Rescission and tender back—Action upon account for purchase price.—If the plaintiff has satisfied you that the machine furnished would accomplish what his contract called for, as the same has been defined by me, then he is entitled to recover the price of the machine together with interest as claimed in his petition.

If, on the other hand, after a full and fair trial of the machine, under the conditions that the contract called for, the machine failed to cut in a suitable manner veneers up to three eighths of an inch in thickness, the defendants, or the parties for whom the machine was purchased, had a right to tender back the machine to the plaintiffs and to rescind the contract. Or, if the plaintiffs refuse to receive back the machine, to place the same in storage at their expense and risks.

If you do not find from the evidence that the machine as constructed was capable of performing the work that the contract required of it to perform, under the conditions that I have laid down, you will then look at the testimony as to how the defendants, B. & Co., or the O. B. Co., dealt with the machine, when after using all proper efforts to make the machine work, with the wood properly prepared for the purpose, and the operator of sufficient skill to work it, the machine failed to perform what was required of it, the defendants, or the O. B. Co., had a right to tender it back, if done promptly, and could thereby rescind the contract. But under such circumstances it is the duty of the party to act promptly, and if he fails to do so, and uses the machine for a considerable period of time afterwards, he no longer has a right to return it.

If you find from the testimony, then, in this case, that the machine was not capable of performing the work for which it was purchased under the warranty, and that the defendant, or the O. B. Co., after fully satisfying themselves on that head, tendered back the machine to the plaintiffs, the plaintiffs would have no right to recover, but if you should find on the other hand that after the defendant, or the O. B. Co., found that the machine would not comply with the terms of the contract, still continued to use it in their business for a considerable period of time, unless you find that they had a right to do so by permission of the plaintiffs, they would then forfeit their right to return it, and their only recourse would be, then, in a suit to recover the purchase money, to set up the warranty and to show how much less valuable the machine was than its contract price, and in such case the sum then shown by the evidence to be the value of the machine to the defendant, or to the O. B. Co., is all the plaintiffs could recover, and with interest from that time.

I will say that in case you should find that the machine did not comply with the terms of the contract, and you should further find that B. & Co., or the O. B. Co., acted with due promptness in tendering it back, that in such case if you should find such a state of facts to exist from the testimony, B. & Co. would be entitled to recover the amount of commission, or amount that they would be entitled to receive on the machine if it had been kept by the O. B. Co., and also the amount of the expense they were put to.¹

Dennis Dwyer, Judge, in *The Brownell & Co. v. William T. Powers*, Supreme Court. Dismissed.

No. 617. Sales—Action to recover balance due on contract of sale of special machinery.—The instructions from which the following extracts are made briefly recite the facts as follows:

The contract upon which both parties rely recites that the plaintiff will furnish to the defendant one of plaintiff's patent flanging machines, and man to superintend setting up and starting the same, complete the machine in six weeks, and sooner if possible, with 12 by 12 engine to run the same, for the sum of \$2,600. The plaintiff guarantees the above machine to flange 120 inches in diameter 1 inch thick, and down as small as 14 inches in diameter and $\frac{1}{2}$ inch thick, and if there are any defects in the machine, will make the same good free of charge to the defendant.

"If the plaintiff did perform his part of the contract; that is, furnish one of their patent flanging machines, a man to superintend setting up and starting the same, with 12 by 12 engine to run the same, that would flange 120 inches in diameter 1 inch thick, and down as small as 14 inches diameter $\frac{1}{2}$ inch thick, and make good free of charge any defects in the machine, so that but for the unskillfulness and mismanagement of the defendant in operating the same, if you so find the fact to be from the evidence, it would (that is, the machine) have performed its work for which it was sold and purchased, that is filling the terms of the guarantee as above recited, but if it failed by reason of such default on the part of the defendant, the plaintiff would be entitled to recover the stipulated price, though it did not successfully perform the work it was guaranteed to perform, if the failure resulted from the aforesaid causes, in which case the plaintiff would be entitled to recover on the first cause of action the full amount of the note therein set out, with interest from —, —, to the first day of this term."

No. 618. Same continued—Recovery for expenses in experimental efforts to put machine in working order.—As to the items of account set up in the second cause of action, you are instructed that the plaintiff can not recover for any expenses incurred in experimental efforts to put the machine in complete working order for practical operation, so as to perform the stipulations of the contract, nor for remedying substantial defects in the machine, either for material, labor, railroad fare, hotel bills, or new parts of the machine furnished by the plaintiff, though the defendant may have requested the same to be done, nor for the set of large clamps if the same were essential to flanging large heads or plates up

to 120 inches diameter. But if the plaintiff did so perform its part of the contract so as to make its guaranty good, remedying such defects free of charge, and any said items were furnished at request of defendant to remedy defects caused by defendant's unskillful or improper management of the machine, or caused by accident, or from ordinary wear and decay, then for such the plaintiff may recover for what the same were reasonably worth. Expenses for repairs usually and naturally incident to the reasonable operation of the machine, if the same was competent to perform the work it was required to do by said guaranty, should not be considered by you as being included in expenses resulting from defects in the machine, and for which if supplied by plaintiff at defendant's request, would entitle the plaintiff to payment therefor for what the same were reasonably worth. The same would be true for expenses for repairs rendered necessary by the ordinary wear and decay of the machine or any of its parts, if operated in a reasonably careful and prudent manner, or from injuries resulting from mere accident while being used by the defendant, such injuries would be at the risk of the defendant, and would entitle the plaintiff to compensation for repairs to remedy such injuries, if furnished at defendant's request.

Voris, Judge, in *Brownell Co. v. McNeil Co.*

No. 619. Same continued—Reasonable time for testing machine—Question of fact.—The defendant was entitled to a reasonable time within which to test and operate the machine, and determine whether he would accept it or not, and in so doing had a right to rely on the stipulations and guaranty of the contract—that the machine would flange 120 inches diameter 1 inch thick, and down as small as 14 inches diameter $\frac{1}{2}$ inch thick, and if there were any defects in the machine, the plaintiff would make the same good free of charge.

What would be a reasonable time is a fact that you may determine from the evidence submitted to you, and until the expiration of such reasonable time the fact that the defendant continued to use the same should not be treated as an acceptance of the machine by the defendant, and in absence of a mutual understanding of the parties to the contrary.

Voris, Judge, in *Brownell Co. v. McNeil Co.*

No. 620. Same continued—Knowledge of defects—Acceptance and continued use—Recoupment of damages between actual value and sale price.—But if after the lapse of

such reasonable time the defendant had the knowledge that the machine could not perform the stipulations of the contract, or reasonably ought to have had such knowledge, though it may have given plaintiff notice to remove the same, and that the defendant would not accept the same as performance of the contract, yet if the defendant continued to use and operate the same and treated the machine as its own, it would be liable to plaintiff to pay therefor the actual value of the machine in the condition it was when finally accepted by the defendant, considering its capacity to perform or not to perform the work stipulated for in the contract, not to exceed the contract price for the machine.¹

But if you find that the machine was not worth as much as the cash payment and the note paid, then the defendant would be entitled to recoup the difference between the amount of the cash and note paid, and the value of the machine so found by you; but this instruction must be understood as only applied in case you find the machine to be less in value than the amount of the moneys actually paid, that is, the cash payment and the amount paid on the first note becoming due.²

¹ Should it have been charged that the value of the property as it would have been if made up to the guaranty less the difference of that value and what it was actually worth as it was? No, because there was no evidence offered to charge that the contract price was not the true value of the property guaranteed to be delivered, which price is presumed to be the value of the property in the absence of allegations and proof to the contrary.

² Voris, Judge, in *The Brownell Co. v. The J. C. McNeil Co.*, Summit County Common Pleas.

No. 621. Same continued—Performance of contract of sale—Modifications.—The defendant is entitled to have the contract substantially performed by the plaintiff, except as its terms may have been modified or waived by the defendant's consent, if such you find to be the fact from the evidence, but not otherwise; but it should be all the while borne in mind that the written contract must prevail as to all matters concerning which it speaks, unless modified by an agreement of the parties made subsequently and upon sufficient consideration. What would be a sufficient consideration, is, if the parties mutually agreed upon a change or substitution of one thing for another, and different from that contracted for, which was accordingly done pursuant to such an agreement, or if the parties acted on such changes and substitutions with full knowledge thereof and acquiesced therein under such circumstances as would make it inequitable to act to the contrary.

Voris, Judge, in *The Brownell & Co. v. The J. C. McNeil Co.*, Summit County Common Pleas. Affirmed by Circuit Court.

No. 622. Same continued—Measure of damages in case of breach of warranty.—If you find the issues with the defendant as to the competency of the machine, and also find from a preponderance of the evidence that upon a fair and reasonable trial and for a reasonable time the machine would not reasonably do the work stipulated for, because of defects therein, and that defendant in making such tests reasonably expended or became liable for the payment of employees and otherwise in and about the machine to make it so operate, and for such other expenses as were, or would be reasonable in contemplation of the parties at the time of making the contract, for this the defendant would be entitled to recover such reasonable expenditures in that behalf incurred; but we say to you that it ought not to be for any expenses incurred or damages so sustained by it, that under all the circumstances reasonably ought to have been avoided by the defendant.

You are instructed also that the defendant ought not to recover for any damages occurring after it became reasonably apparent to the defendant that the machine was inadequate to perform the services the defendant required of it, or to which it was thereafter put by the defendant. . . .

In operating the machine it was and is the duty of the defendant to employ reasonably careful and skillful men, and to see to it that the machinery was properly cared for and kept in proper working order, and that the processes employed in flanging were conducted with reasonable care, prudence and skill, and if there was any default in these respects by the defendant or its employees, and any failure resulted therefrom, then the defendant must bear the consequences thereof, and can not charge the same to the plaintiff. Trifling deviations, defects or omissions in the machine known to the defendant, or that reasonably ought to have been known to it, if it exercised reasonable care and skill under the circumstances, which could be supplied or remedied by slight efforts or expense, ought not to be considered by you otherwise than laying a foundation for the recovery of necessary expenses of remedying them.

Voris, Judge, in *Brownell Co. v. The J. C. McNeil Co.*, Summit County Common Pleas. Affirmed by Circuit Court.

No. 623. Same continued—What is an acceptance.—The fact that the cash payment was made and the two notes mentioned in the contract were given, one of which was paid by the defendant, on the other of which payment was refused, is to be taken by you that with the other circumstances

in evidence before you, to have such effect as you may see fit to give to it in determining whether or not the defendant accepted the machine as a fulfillment of the contract. But the defendant is entitled to have this considered by you in the light of the knowledge it had or reasonably ought to have had of the character of the machine, and its capacity for doing the work it was guaranteed to do, which knowledge may be considered by you in the light of the representations made to plaintiff, including its circulars and letters sent defendant by plaintiff relating thereto, which representations it would, if acting in good faith, be entitled to believe and rely on. The matter of acceptance of machine or waiver of defects therein is a question of intention to be determined by you from the means of knowledge which the defendant had; whether he did or did not rely in good faith upon the assurance of plaintiff, and the manner of using the machine by defendant.

Both parties should act in the premises in such a reasonable manner as to save themselves from unnecessary damage, and if they did not so act it lays no ground of recovery for any damage that might have been so averted.

Voris, Judge, in *The Brownell Co. v. The McNeil & Co.*, Summit County Common Pleas. Affirmed by Circuit Court.

No. 624. Machinery sold for particular purpose—Whether a breach of warranty—Deficiencies from general adaptation to purposes warranted.—It is claimed by the defendant that the machinery was sold upon a warranty; that the machinery would do and perform, in a good and perfect manner, all work for which it was designed, and I instruct you that the warranty was that which was given in evidence, and which was part in print and part in writing, and was the warranty which I have just given you by reading the same from plaintiff's reply, which you will have with you and which contains the warranty on which the goods were sold, and no other warranty has anything to do with it. This written warranty, with all its conditions and limitations expressed in it, is conclusive between and is binding on all the parties. It is in that "The law of the parties" and they must be held to it to the exclusion of all outside stipulations.

Now then, under the instructions which I shall give you, was there upon the part of the plaintiff any breach of this warranty? Did this machinery do bad work, and was it unfit for the purposes and uses of threshing and cleaning small grain, such as threshers and separators are used for? If it did good work while in the defendant's hands, that must

be an end to your inquiry, and your verdict should be for the plaintiff, but if it did bad work, you will then inquire what was the cause of it. Was it because it was not well-made or of good material, or from deficiencies from general adaptation to the purposes for which it was warranted? If it was, then that would be a breach of the warranty on the part of the plaintiff, and they could not recover if nothing else appeared; or was it because the machinery was improperly run, or not properly managed, or was badly managed, or because upon starting the machine the defendants did not intelligently follow the printed hints, rules, and directions of the plaintiff? If it was from such cause or causes, it would not be a breach of warranty on the part of the plaintiffs, nor prevent them from recovering in this action. And upon this question you may look into the evidence as to how it worked in the hands of others, not for the purpose of determining whether it worked badly in the hands of the defendants, but whether it was the fault of the machinery or of defendants, as shedding light on that question.

John D. Nicholas, Judge, in *Nicholas, Shepard & Co. v. Orr*. Approved.

No. 625. Same charge continued—If directions followed—and it still did not operate—Duty to give notice—Duty to remedy defects.—If they did intelligently follow the hints, rules, and directions of plaintiffs, and yet were unable to make the machine operate well, it was the duty of the defendant immediately to serve written notice on the plaintiffs at —, —, and also on S., stating wherein it failed to perform according to its warranty, and to give the plaintiffs reasonable time to remedy the defects, if any, unless it was of such nature that it could be done by letter of advice, and then if the defect is one which was inherent in the machinery, plaintiffs would remedy it at their own expense, but if it arose from improper management of defendant, or lack of proper appliances by them, or a failure to observe the hints, rules, and directions of plaintiffs, then the defect was to be remedied at the expense of defendants. *But if such notice be given, plaintiffs are bound to remedy* the defects either at their own or defendants' expense, according as it might be the fault of the machine or of the defendant. But they were not bound to do this unless they first received such notice, and they had a right to stand and insist upon a written notice, and, unless they got it, they were not bound to do it; but while this is so they could waive the writing and act upon a verbal notice either to themselves or to their agent, S., and if they did get verbal notice of the defects of the machine, and did not de-

mand a written one, but undertook to act under the verbal one, they thereby waived notice in writing, and were bound to remedy any defects which you shall find existed in the machinery which hindered it from doing good work.

(a) Defendants may refuse to keep machinery.

And the defendants then had the right to refuse to keep the machinery, and might legally have notified plaintiffs to take it away, and deliver up the notes and mortgages, and demand the return on the payments made upon it. But did they do this, and if they did not, why did they not?

(b) Waiver of right to return—Or induced not to do so.

If it was by their own neglect, they thereby waived their right to do so, but if they were induced not to do it, but to keep it and give further opportunity to the plaintiff to remedy the defects, it would not be a waiver on their part, and they would not lose their right to return the machinery, and make their demands for a return of what they had paid at any future time, upon the failure of plaintiffs to remedy the defects and make the machinery perform according to the warranty. Was such tender of the machinery and the return of the notes and mortgages ever demanded? If so, was the property machinery ever taken by plaintiffs under their chattel mortgage and disposed of under it? If so, was such tender and demand made before the property was so taken under the mortgage? If it was so tendered before and because the defects in the machinery were not remedied, the plaintiffs were bound to accept it, and the defendants would be released from the payment of the notes, and entitled to have them delivered up, and a return of what they had paid upon the machinery to the plaintiff.

(c) Use without giving notice of deficiencies according to terms of warranty—Effect.

But as to certain deficiencies in the machinery, other than the material and make of it, that is to say, deficiencies in the general adaptation of the engine for developing the rated power, and of the separator for threshing, separating, and cleaning, it is stipulated in the warranty and contract that all such are to be reported to the plaintiffs at —, and to the agent, S., through whom the machinery was purchased, within five days after starting the machine, and not after continued use and injury to the machinery. And it is expressly stipulated that use without such notice is conclusive evidence of satisfaction and fulfillment of all warranty in that regard. This is a different matter from defects in the mechanical construction of the machinery, or the material of which it is made, and goes to the principal on which the

machinery is constructed, and capacity to perform the work of machinery designed for threshing and cleaning grain, faults or deficiency of that nature it is assumed would be discovered at once on starting the machine, or very quickly thereafter, and therefore it is that they require a prompt report, and it is stipulated that a failure to so report such deficiencies within that time after use of it shall be conclusive. Now, did the defendants serve such notice within that time after starting such machinery? If they did, they would have performed the conditions of the contract on their part, but if they did not, they would not have so performed such conditions, and can not give notice after the termination of five days after they have commenced to use it, and could not claim to be heard as to such defects after that time; they would be estopped from complaining of them after that time.

(d) *Kind of notice—Verbal or written—Response to verbal notice—Waiver of written.*

But it is claimed that this notice should be in writing, and one sent to —, and the other to the agent, S., and that if they did all these, then it would make a compliance with the conditions of the warranty on their part; I do not so understand the law, but say to you that if verbal notice was given to the plaintiff at —, or to the agent, S., at their place, either within or without the five days, it was the right of the plaintiffs to stand upon the written warranty and refuse to act upon any other than a written notice. But if, on the contrary, on the receipt of such verbal notice, no objection was made to its being verbal instead of in writing, or as to the time when given, and the plaintiffs, either by themselves or by their agent, S., acted upon said notice, and in pursuance of it undertook to remedy the defects complained of, it was a waiver of the conditions of the warranty as to such notice in writing, and was a sufficient notice, although verbal.

John D. Nicholas, Judge, in *Nicholas, Shepard & Co. v. Orr*. Affirmed by Supreme Court.

No. 626. Defense—Fraud and deceit in sale of property—Parties dealing on an equality.—Deceit or fraud in business transactions consists in fraudulent representations or contrivances by which one person deceives another who has a right to rely upon such representation, or has no means of detecting such fraud. It is the law that fraud vitiates every contract. There is no exception to this rule. When fraud is proven to have promoted the making of a contract, it is void and can not be enforced. Fraud taints every transaction which is the result of it. But fraudulent representations in

the sale of property will not *in themselves* always constitute deceit which will be the subject of an action for damages.

Where parties deal with each other on a footing of equality, there must be some existing circumstances or some means used calculated to prevent the detection of falsehood or fraud, and impose upon a purchaser of ordinary intelligence, prudence, and circumspection. If the purchaser has full opportunity to examine the property, and can easily and readily ascertain its quality and value by inspection, and he neglects to do so, then any injury which he may sustain by such negligence is the result of his own folly, and he can have no relief at law, unless the representation was of such a character as to mislead a prudent person or put him off his guard. The law wisely and justly presumes in such a case that a purchaser will take care of his own interests, and that, when he distrusts himself, his own judgment and shrewdness, he will protect himself from imposition.

Pugh, Judge, in *Spencer v. King*, Franklin County Common Pleas.

No. 627. Same continued—Opportunity of inspection.—When the purchaser has a full opportunity to inspect the property, but fails to do so, and the representations were not such as should have misled him, he has no right to complain if the property sold does not measure up to the representations of the seller.

Pugh, Judge, in *Spencer v. King*, Franklin County Common Pleas.

No. 628. Same continued—What commendations may be made.—It is well known that, in the course of trade, vendors will speak in terms of high commendation of the property which they are offering for sale. Such "dealing talk" is not deemed in law as fraudulent, unless accompanied with some artifice calculated to deceive the purchaser and throw him off his guard, or some concealment of intrinsic defects not easily discoverable by reasonable diligence and care.

Pugh, Judge, in *Spencer v. King*, Franklin County.

No. 629. Same continued—Expression of opinion by seller as to amount, value, and quality.—The opinion which the seller of property expresses concerning the amount, value, and quality is frequently asked for and given at sales, and is never ground for a law suit when it proves to be untrue, if it was only an opinion and was honestly given.

But if the statement of the value was more than an opinion, if it was an affirmation of a specific material fact, if it

was deliberately made by the seller who had superior knowledge in regard to it, and if it was acted upon by the buyer, and if it was known to the seller to be false, it may be deemed fraudulent and a sufficient basis for an action. The rule of law applicable to this matter is this: The property in question was situated in another state not accessible to the observation and judgment of either party. If the defendant had knowledge of its value superior to the other party, if he deliberately represented that it was worth — dollars per acre, and that was more than the general praise or puffing which sellers are liable to indulge in, if he knew it was false, and if the plaintiff, acting upon such representations, purchased the property, it is competent for you to infer that it was a fraudulent representation, unless you further conclude that it was not material. If you find that the representations as to the value of the land were only opinions, only trade talk, then the plaintiff can not recover, notwithstanding the opinions were not well founded. The law does not assist the purchaser who pins his faith to the exaggeration of the value of property made by sellers of it.

Pugh, Judge, in *Spencer v. King*, Franklin County Common Pleas.

STATUTES OF LIMITATIONS.

No. 630. Statute of limitations—New promise to be in writing.—"The jury, in order to take the case out of the statute of limitations and entitle the plaintiff to recover, must find from the testimony that the defendant has, within the last — years before the commencement of this action, made his promise in writing to pay said note (or whatever it may be), or that he has actually paid thereon some portion of the principal or interest thereon within the time aforesaid."

From *Bridgeton v. Jones*, 34 Mo. 472.

No. 631. New promise reviving claim.—"The court instructs the jury that the instrument dated —, 18—, which has been received in evidence, was barred by the statute of limitations before this suit was brought, and no recovery can be had on the same unless the defendant, within — years before the beginning of this suit made a new promise; and the burden of proof of that rests upon the plaintiff and not upon the defendant. The plaintiff must recover, if at all,

upon the preponderance of the testimony. If the plaintiff claims the right to recover upon a new promise alleged to have been made by the defendant, and the testimony upon that point is so conflicting that the jury can not determine whether such a promise was made or not, they must find for the defendant."

From *Parker v. Hawley*, 4 Colo. 336.

No. 632. Statute of limitations—Revival of debt by promise.—"The promise by which a discharged debt is revived must be in writing, clear, distinct, and unequivocal. There must be an expression by the defendant of a clear intention to bind himself to the payment of the debt. The new promise must be distinct, unambiguous, and certain. The expression of an intention to pay the debt is not sufficient. There must be a promise before the debtor is bound. An intention is but the purpose a man forms in his own mind; a promise is an express undertaking, or agreement, to carry that purpose into effect, and must be express in contradistinction to a promise implied from an acknowledgment of the justness or existence of the debt."

From *Shockley v. Mills*, 71 Ind. 292.

No. 633. Kind of writing sufficient to take out of statute of limitations.—"There is some controversy as to whether said writing is sufficient to take said claim of plaintiffs, if you find such claim to have existed, out of the statute of limitations, that is, as to whether such writing is a sufficient acknowledgment to enable the plaintiffs to now sue upon their barred claim.

You must first find if said writing was made within the six years next preceding the time of commencement of this action; if you so find, then if you further find that said writing was made by said E. S. herself, with her own hand; that there is inserted somewhere in said writing her name of E. S., or any other name by which she was commonly known; that said name was so inserted in said writing by her with the intent that she should be bound thereby as a complete acknowledgment of indebtedness upon her part, and it was so written to give authenticity to said writing; and if you further find that the said writing was shown by her to either the plaintiffs, or to another person than the plaintiffs, with the intent that the same should be communicated to the plaintiffs, then the said paper writing would be a sufficient acknowledgment in writing, although not signed by her at the end thereof, of the plaintiffs' claim; only, how-

ever, to the extent that said paper writing does acknowledge said claim. If you find that the terms of said paper writing are sufficiently explicit as to show an acknowledgment of the plaintiffs' claim, and find the other facts as the court has instructed you, then upon this point you will find for the plaintiffs. But the court further charges you that it is incumbent upon the plaintiffs to establish this said alleged acknowledgment of said barred demand by a preponderance of the testimony.

If, under the instructions of the court, you find for the plaintiffs upon the first point mentioned, namely, as to whether said plaintiffs made said loan, as alleged in the petition; and if, under the further instructions of the court, you find for the plaintiffs upon the second point mentioned, namely, as to whether there was an acknowledgment in writing by said E. S. of said original claim, and that said acknowledgment was properly signed by her in the manner and for the purpose which the court has instructed you, then your verdict will be for the plaintiffs for the amount of said original indebtedness, with interest thereon from the date or dates when the said loan or loans were made.

If, however, you find that the plaintiffs have not made out their alleged cause of action, either as to the validity of the original claim, or the sufficiency of said alleged acknowledgment, then you will find for the defendant; and in this connection, in view of the claim made by the defendant that the alleged loan, if you find one to have been made, was made not to E. S. but to N. S., "the court further instructs the jury that if they find this money was loaned to N. S. alone, and not to E. S., or E. S. and N. S. jointly, then you must find for the defendant."¹

"The court instructs the jury that in this case the statute of limitations is a complete bar, and that the jury must find for the defendant, unless the jury further believe that the said E. S., within six years of the commencement of this suit, made and signed a written acknowledgment of the debt sued for."

"I charge you that an acknowledgment of a demand to revive it against the statute of limitations is independent of any promise expressed or that may be implied from such acknowledgment. An acknowledgment of the demand in the ordinary sense of the word is all that is necessary."²

¹ John C. Miller, Judge, in *Lothscheutz v. Lothscheutz*, Clarke County. The Circuit Court reversed the Common Pleas, and the Circuit Court was affirmed by the Supreme Court, but this portion of the charge seems sound. The error of the trial court was in not directing a verdict. R. S., Sec. 4992.

² John C. Miller, Judge. *Id.*

No. 634. Limitation upon an account.—The court further says to you as a matter of law, that where the statute of limitations is set up against an account, each item of the account is barred in six years after the right of action accrued thereon, unless it is taken out of the statute on some special ground.

Evidence has been given tending to show the dates when the various items of the defendant's account accrued, and if you find from the evidence in the case that any or all the items of such account accrued more than six years before the commencement of this suit, then, in order to prevent the statute of limitations running against such items of account, the defendant must show by a preponderance of the evidence in the case that such items of account were made as payments upon the note in question, and was so understood by the parties at the time; and, if you find that these items of account were not made as payments on the note, was not intended to be such by the parties at the time, the account was made and the goods furnished, then they would not be credits upon the account, and all items in defendant's said account which accrued more than six years before the commencement of this action would be barred by the statute of limitations, unless, as I have said to you, that when they were furnished to the plaintiff's decedent they were to be as credits upon the note, and, if they were, they should be allowed by you.

Gillmer, Judge, in *McGaughey, admr., v. Cramer, Trumbull County Common Pleas.*

STREETS.

See also **Municipal Corporations.**

No. 635. Abutting owners. What is ownership.—Now, first, as to the question of ownership of the plaintiff. The plaintiff can not recover in this action unless she has satisfied you by a preponderance of evidence that she is the owner in fee simple of the premises described in this petition, and unless you are satisfied that these premises are situated on or abutting upon the street upon which this railroad runs its trains.

If you find from the evidence, gentlemen, that the plaintiff was in possession of these premises at the time of the bringing of this suit, and at the time of the construction of

the railroad, and during the time of its operating said railroad, under a deed purporting to convey to her the fee simple in said premises, then you will be authorized to find that she is the owner of the premises.

The plaintiff introduces in evidence three separate deeds. I may say to you, as a matter of law, that the purport and effect of these deeds is to convey the fee simple, or title, to these premises described to plaintiff. Now, you may look at the evidence. If you find that this plaintiff is in possession of these houses or premises described by her, in possession by herself or by tenants, then you will be warranted in finding that she is the owner of the premises in fee simple in the petition described. But if you find that she is not in possession of the premises under the deeds that have been offered in evidence, then you will not be authorized to find that she is the owner in fee simple of the premises described in the petition. And if you find that she is not, your inquiry will end, and your verdict will necessarily be for the defendant. But if you find, after consideration of all the evidence, that she is such owner, then you may inquire next whether she is damaged by reason of the operation of this railroad along — Avenue.

J. B. Driggs, Judge, in *C. L. & W. R. R. Co. v. Vennum*, Sup. Ct., 2603. Judgments affirmed.

Whenever it is necessary for the owner to prove title, a *prima facie* case is made out by proving possession under a deed purporting to convey a fee. *Lewis*, Em. Dom. Sec. 442; *Carl v. Sheboygan & Fond du Lac R. R. Co.*, 46 Wis. 625; *Whitman v. Boston & Maine R. R. Co.*, 3 Allen, 133.

No. 636. Abutting owner—Rights in street—Damage by construction of railroad in.—The plaintiff has a right, if she is the owner of these premises on — Avenue, distinct and independent of the rights of the city. This right which the plaintiff had in the street fronting on her premises was one which the city can not pretend to claim—of an abutting landowner; and the plaintiff in this case had an incidental title or certain franchise in the street—the right to the use of the street unincumbered by railroads or anything that it was not intended for. Now, this plaintiff would be entitled to recover damages—such damages as she has sustained by reason of the diversion of the street from the uses which it was originally intended for; an appropriation for other or unusual uses. I may say to you that the appropriation of a street by a railroad, and running of its locomotives and cars over such railroad, is a diversion of the street from the use which it was originally intended for; and if such railroad appropriates such street, and lays its track thereon, and runs its loco-

tives and cars over the same, abutting land-owners would be entitled to recover whatever damages they may have sustained thereby.

Now, you may look to all the evidence in determining this question. Has the plaintiff's access to these premises been lessened by reason of the construction and operation of this railroad? Has the beneficial use of the street to her property been destroyed in any measure by the construction and operation of the defendant's railroad?

J. B. Driggs, Judge, in *C. L. & W. R. R. Co. v. Vennum*, S. C., 2603. Judgments affirmed.

No. 637. Same continued—Damages.—In considering the question of damages you may take into consideration annoyance caused (if it has been shown that there was any) by smoke, cinders or noise caused by the operation of the defendant's railway. Take all these facts into consideration in determining the amount of damage that the plaintiff has sustained by reason of the construction and operation of the defendant's railroad.

In determining this question you may consider the evidence of the witnesses that have been called to state their opinions of the diminished value of the property since the construction of the railroad.

A number of witnesses have been called who have testified as to its value before the construction of the railroad and as to its value since that time. You may consider their evidence in determining the amount that she is entitled to recover if you should find that she has sustained damages. And in considering this evidence you will look carefully to the means these witnesses have as to knowing the value of this property, their means of knowing; their estimates of values are merely opinions.

The weight and credit given to such opinions depends largely upon the means they have for knowledge; of knowing as to what is testified to. A witness, if he has but little knowledge of the value of property in —, his opinion as to the value both before and after the construction of the railroad would be of little value.

But if you find from the evidence or statements of the witness that he has large experience in that vicinity, and has made careful examination of that property, and is a man of sense and intelligence, his opinion should be entitled to weight and consideration by the jury in determining the question of damages.

J. B. Driggs, Judge, in *C. L. & W. R. R. Co. v. Vennum*, S. C., 2603. Judgments affirmed.

No. 638. Damages resulting from construction and operation of commercial railroad in street under license or agreement with municipality—to egress and ingress to and from business portion of city—schools, churches, etc.,—causing permanent injury to premises. — You will proceed to inquire and determine whether or not the premises of plaintiffs are so situated and located as to be injuriously affected by the improvements of the defendant placed upon said street, and as the direct and necessary result thereof, in any or all of the particulars complained of, and if you find that the premises are not so situated and located, or are not so affected, and the means of ingress to and egress from plaintiffs' premises were as good, safe and convenient after the railroad of defendant was constructed on — Street as the same was before the railroad was constructed thereon, then you need not inquire further, but should return your verdict for defendant. But if you find that the property and premises of the plaintiffs are and were so situated and located by reason of the same abutting upon said street, and by reason of the same being located so *near* to that portion of — Street occupied by defendant with its railroad tracks, in pursuance of the contract with the city council, that, as a direct and necessary result thereof, said premises were substantially injured and lessened in value, and which injury and lessening in value can be fairly attributed to the acts of the defendant in occupying and using said street under and in pursuance of the contract, made and entered into by and between it and the council of the city of —, then your verdict should be for the plaintiffs in such sum as will fully compensate them for the damages they may have sustained by reason thereof, as may be shown by the proof in this case.

(a) *In determining this question of injury and damage*, and before you can return a verdict for the plaintiffs, you must find, not only that the injury to the plaintiffs was a substantial one, caused in the manner and by the means just mentioned, but it must also be of a character different from what the public at large would and did suffer, by reason of the travel upon the street being obstructed or interfered with by the acts of the defendant. Mere inconvenience in the ingress to and egress from the property of plaintiffs is not sufficient to entitle them to a recovery, unless such inconvenience extends so far as to deprive them of a substantial right, and result in a substantial injury to their premises. Neither would the mere fact, if you find it to be a fact, that the property and premises of the plaintiffs were of less value *after* than *before* the location of defendant's railroad upon the

street, entitle the plaintiffs to recover, unless you find that such diminution in value could *only* be fairly attributed to the location and construction of the railroad by the defendant upon such street under and in pursuance of the contract with the city council in the manner and upon the terms and conditions therein set forth; and that such diminution in value was the direct and necessary result thereof.

Upon all these matters the burden of proof is upon the plaintiffs, and they must satisfy you by a preponderance of the testimony of the truth of the several matters here stated as being necessary to be established in order to entitle them to recover.

(b) *In determining whether or not the plaintiffs' ingress to and egress from their premises have been impaired*, you need not and should not consider any obstruction not *necessarily* placed in the street in the construction, location, and operation of the railroad by the defendant; and if you find that the embankment mentioned as existing at the intersection of — Street with — Street was not placed there by the defendant, or if so done, the same was not *necessarily* so placed there by the defendant in the construction, location, and operation of its railroad under the contract with the city council, then this need not and should not be considered by you, and in determining this question as to whether the means of ingress and egress have been destroyed or substantially impaired, you should look at all the circumstances surrounding the parties and premises at that time, the condition of — Street at that time, what other railroad tracks, if any, were located thereon or across the same, the condition of — Street and the streets connected therewith, furnishing plaintiffs access to the business portion of the city, the extent to which the means of access, as they then existed, have been impaired or destroyed, if you find the same to have been impaired or destroyed by the defendant in the manner and by the means just mentioned; and from all these circumstances, as proven, determine what injury, if any, has resulted directly to plaintiffs' premises therefrom, which is fairly attributable to such act or acts of defendant; and you should be careful to exclude from your consideration all matters affecting the property and premises of the plaintiffs, which are *not* fairly attributable to such act or acts of the defendant, directly resulting in injury to the same in the particular mentioned and in the manner mentioned.¹

¹ J. R. Johnston, Judge, in *P. C. & T. R. R. Co. v. Kearney*, Supreme Court. Judgments affirmed.

(c) Measure of damages.

If you find in favor of the defendant, your verdict should be "for the defendant" in general terms. If you find in favor of plaintiffs, then your verdict should be for the plaintiffs in such sum as will fully compensate them for injury their premises have actually sustained under the directions here given you in the charge, and this would be the actual damages resulting to the premises of the plaintiffs directly from the act or acts of the defendant as herein limited, arising at the time of the location of said defendant's railroad, and by reason thereof, and whilst you should not compute interest on this amount, you may take into consideration the length of time that has elapsed, during which the compensation has been withheld, not as interest, but as a part of the compensation to which the plaintiffs would be entitled to make them whole. In determining this amount, you should consider all the testimony bearing upon this subject, and should not by agreement add together the amounts testified to by each witness and divide the sum thus produced by number of witnesses testifying, taking the quotient thus obtained as your verdict arbitrarily; but you should consider the testimony of each witness upon this subject and give to the testimony of each the weight that in your judgment it may be entitled to, and from it all arrive at your verdict.²

² Id.

SURETIES.

No. 639. Liability of sureties on bond of agent, where agent had previously been a defaulter—Duty of company to sureties.—"If A. B., at and before the time the bond was required of him, was intentionally and dishonestly a defaulter to the company, as to moneys intrusted to it, which he had received as its agent, and that the witness acted for said company in demanding and receiving the bond, and, before receiving the same, either knew of such default, or if he did not know it, believed upon reasonable and reliable ground of information or belief, that such default existed, then, if suitable and reasonable opportunity existed, it was the duty of the witness, as the agent of the company, to make known to the sureties upon the bond such fact of A. B.'s delinquency, or witness' belief of such delinquency, before accepting the bond, although witness did not know before the bond was signed by the sureties who they were to be, and, as witness did not give such information, if the sureties, in signing the bond, acted under a belief from its recitals that the company considered A. B. a trustworthy person, and would not have signed the bond but for such belief, then the plaintiff can not recover against the sureties, or either of them.

“But if A. B. had not been a defaulter at the time of the acceptance of the bond by witness, or if he was so by mere mistake, or other cause not involving intentional wrong, and the witness, at the time aforesaid, knew or believed such delinquency existed, it was not the duty of witness to make this knowledge or belief known to said sureties, or either of them, and his failure to do so would not vitiate the bond.

“Or if witness was, at the time of accepting the bond, at such a distance from the said sureties that, under the circumstances shown by the testimony, he could not reasonably inform them of such delinquency, he was not bound to give them this information, although the agent had been dishonestly a defaulter, and the witness knew or believed that fact, and his failure to do so would not vitiate the bond or prevent plaintiff from recovering upon it against the defendants.”

From *Dinsmore v. Tidball*, 34 O. S. 411.

TENDER.

No. 640. Definition and object of tender.—The jury are instructed that when a party has entered into an obligation (either) to pay money, (or) to deliver goods, (or) to perform services, and, by some outward expression or act, in effect tenders or offers to perform the obligation in the manner agreed upon, the law considers that he has, in fact, substantially performed it. A tender is an offer (either to pay a debt or) to perform an obligation. To be effectual, the party making it must continue ready and willing to pay or perform the obligation, and must have the ability to perform. The effect of a valid and legal tender is, that the party acknowledging an indebtedness of the amount tendered (or of an obligation to perform an act) is to stop the running of interest, and to protect him from the payment of costs.¹

To be effective as a tender it must be kept good by the payment of the money into court for the plaintiff;² and it must be actually offered to the person to whom it is made, so that he can see it,³ and it must be the amount actually due.⁴

¹ *Halpin v. Ins. Co.* 118 N. Y. 165; *Tiedeman on Sales*, Sec. 139.

² *Armstrong v. Spears*, 18 O. S. 378.

³ *Pinney v. Jorgensen*, 27 Minn. 26; *Hoffman v. Van Dieman*, 62 Wis. 362.

⁴ 5 Mass. 365.

If you find from a preponderance of the evidence that the defendant has complied with all these requirements, then you may be justified in finding that a tender has been made. But if you find that the defendant merely expressed a willingness or readiness to pay without offering a definite sum or the amount actually due, and that he did not actually produce and offer to pay, and that he did not keep such offer good by tendering or depositing it in court, then you can not find that a tender was made.⁵

The defendant need not, however, actually produce the money where the plaintiff has done something which would make it unnecessary, as where the plaintiff says that the defendant need not produce it, that it would not be accepted.⁶

⁵ Must actually produce the money. 41 Cal. 420; 8 Neb. 507; 46 Barb. 227.

⁶ 8 O. 173; 8 Neb. 507; 10 Cush. 267

WILLS.

No. 641. Contest of will—Who may make a will.—

Under the law of Ohio any person of full age and sound mind and memory, and not under any restraint, having any property, personal or real, or any interest therein, may give and bequeath the same to any person by last will and testament lawfully executed.¹

The law further requires that the will in controversy being a written one, shall be signed at the end thereof by the said (testator), or by some other person in his presence by his express direction, and shall be attested and subscribed in the presence of said (testator), by two or more competent witnesses, who saw the said (testator) subscribe or heard him acknowledge the same.²

¹ R. S., Sec. 5914.

² Cyrus Newby, Judge, in *Graham v. Graham*, Highland County Common Pleas. R. S., Sec. 5916; Whittaker's Probate Code, Sec. 5916, with notes, p. 182-183.

No. 642. Same continued—Requirements of a valid will.—In order that it may be his last will and testament, he must have been of full age, that is, at least twenty-one years of age, at the time of executing it, of sound mind and memory, and not under any restraint, and have property, real or personal, or some interest therein. It is further necessary that the paper produced as his will should have been signed at the

end thereof by the said (testator), or by some other person in his presence, and by his express direction, and attested and subscribed in the presence of said (testator), by two or more competent witnesses, who saw the said J. G. subscribe or heard him acknowledge the same. If any one of these requisites should be lacking in the execution or attestation of the paper produced as the last will and testament of said (testator), it would not be a lawful will, and its probate should be set aside.

Newby, Judge, in *Graham v. Graham*, Highland County Common Pleas. Whittaker's Probate Code, Sec. 5916, and notes on p. 182-3.

No. 643. Same continued—Weight given order of probate.—The law of this state provides that the order of probate of a will is *prima facie* evidence of the due attestation, execution and validity of the will. That is, such will and order of probate furnish such an amount of evidence that, were no further evidence offered, the defendants would be entitled to a verdict sustaining the will as probated by the probate court.

Newby, Judge, in *Graham v. Graham*, Highland County Common Pleas. The probate makes a *prima facie* case, putting the burden on the contestants. *Haynes v. Haynes*, 33 O. S. 598; 15 O. S. 1.

No. 644. Same continued—Burden of proof.—The order of probate being *prima facie* evidence of the due execution and validity of the will, it, therefore, devolves upon the plaintiff to prove by a preponderance there that the will was not signed, or acknowledged and attested, as required by law, or, if so signed, or acknowledged and attested, that, at the time said will was so signed, or acknowledged and attested, the said (testator) was not of sound mind and memory, or that, at that time, the said (testator) was under restraint or undue influence.

If the plaintiffs have proved by a preponderance of the evidence any one of these things, as to which the burden of proof was on them to prove, then you should return a verdict finding the paper produced not to be the last will and testament of the deceased, but if they have failed to prove any one of them to your satisfaction by the preponderance of the evidence, you should, in that case, return a verdict sustaining the will.

Newby, Judge, in *Graham v. Graham*, Highland County Common Pleas. *Haynes v. Haynes*, 33 O. S. 598. On the trial of such issue, the order of probate shall be *prima facie* evidence of the due attestation, execution and validity of the will or codicil. Whittaker's Probate Code, Sec. 5862. The effect of this provision is, after the order of probate is offered in evidence, to transfer the burden of proof in respect to each of these subjects from the propounders or contestees to the contestants. In the further

progress of the case there is no change of the burden of proof, in law, as to require of the court, in the charge to the jury, an instruction that in respect to any particular issue or items of evidence, the burden of proof is thrown back from the contestants to the contestees. *Mears v. Mears*, 15 O. S. 90.

No. 645. Preponderance of evidence—Meaning of, in contest of will.—By the preponderance of evidence is meant the greater weight of the evidence. The evidence may be said to operate in favor of one party whenever the greater weight of the evidence, when freely and fully considered, is in favor of the claims of such party. If the evidence in this case shows to your minds that it is more probable either that said (testator) did not make the will in the manner required by law, or that, at the time of making the same, if you should find that he did make it, he was under restraint and undue influence, or was mentally incapable of making the same, under the rules of law hereinafter to be given, then and in that case, the plaintiffs will have made out their case by a preponderance of the testimony.

On the other hand, if the evidence should not show it more probable that some one of these facts exist (that is, the facts necessary to the making of a correct will, see No. 642 ante), or if the evidence on these points be evenly balanced, in either event there would be no preponderance in favor of the plaintiffs, and you should, in such case, return a verdict sustaining the will. The defendants are entitled to a verdict sustaining the will as probated, unless the preponderance of the evidence is in favor of the plaintiffs on at least one of the grounds they are required to establish as above stated.

Newby, Judge, in *Graham v. Graham*, Highland County Common Pleas.

No. 646. Witnesses need not see testator sign if acknowledged before them.—It is not required that the subscribing witnesses to the will should have signed the same in the presence of each other,¹ but they must have subscribed the same in the presence of the testator. Nor is it required that both subscribing witnesses should have been present at the signing of the paper claimed to be the will of said (testator) or, in fact, that either should have seen the said testator subscribe the instrument, but in case either should not have seen the said testator subscribe said paper, then it becomes necessary that the testator should have acknowledged to the witnesses that the paper which he had signed was his last will and testament.² This acknowledgment by the tes-

¹ *Raudebaugh v. Shelley*, 6 O. S. 306.

² *Reynolds v. Shirley*, 7 O. (pt. 2) 39.

tator is not required to be in any particular form of words, or in any specified manner. But the testator must, by some words, conduct, or the attending circumstances, give the witnesses to understand that he acknowledges the signature to the instrument as his, and the instrument itself as his will.³

³Newby, Judge, in *Graham v. Graham*, Highland County Common Pleas. See charge in *Haynes v. Haynes*, 33 O. S. 610.

THERE *need be* no precise form of acknowledgement. "It is not necessary that any precise form of words should be used by the testator in acknowledging either his signature or will. It will be sufficient if by signs, motions, conduct, or the attending circumstances, he gives the attesting witnesses to understand that he acknowledged the will and the signature to be his. If, therefore, you shall find from the evidence that Mr. H. authorized Mr. A. to sign his (H.'s) name to the will when no other witness was present, and A. did so sign the will in the presence of H., and afterward, on the same day, Mr. H., either by words or signs, motions, conduct or the attending circumstances, give the attesting witnesses to understand that he acknowledged the signatures, and requested them to attest the will, and that they did so attest the will in his presence, this will be a sufficient acknowledgment and attestation of the signature, and your verdict should be for the defendants and the will." *Id.*

No. 647. Rules governing determination of mental capacity.—In order to be able to make a valid will it is necessary that a man shall have mental capacity sufficient for the transaction of the ordinary affairs of life, and if he possess this, though he may be feeble in mind and body from sickness, old age or other cause, he has a legal right to dispose of his property as he sees fit, without regard to the wishes of others.¹

The law does not undertake to test a man's intelligence, or to define the exact quality of mind and memory which a testator must possess, but it does require him to be capable of knowing the extent and value of his property, the names or relationship of those persons who are the natural objects of his bounty,² their deserts in reference to their conduct toward and treatment of him, their condition and necessities, and be capable of retaining all these facts in his memory long enough to have the will prepared and executed.³

He may not have sufficient capacity to make a contract, but he must understand substantially what he is doing, the nature of the act in which he is engaged, the extent of his property, the relations of others, who may, or ought to be,

¹Old age alone does not disqualify one from making a will. *Schouler on Wills*, Sec. 114; 72 N. Y. 266; 33 Mo. 175. Wills of aged persons should be scrutinized by the court. *Beach on Wills*, Sec. 99. The testamentary capacity of aged persons is generally a question of fact. *Id.* and note; *Hegney v. Head*, 29 S. W. 1072 (Mo.), testator eighty years old.

²*Townsend v. Bogart*, 5 Redf. 93, 104; *Beach on Wills*, Sec. 97.

³*Id.* *Bundy v. McKnight*, 48 Ind. 502, 511. Old age does not disqualify if testator is rational, and has capacity to know condition of his property, his relations to the objects of his bounty, and the scope and bearing of his will. *In re Pike's Will*, 41 N. Y. S. 639.

the objects of his bounty, and the scope, bearing and effect of his will, and must have sufficiently active memory to collect in his mind, without prompting, the elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive and consider their obvious relations to each other, and be able to form some rational judgment in reference to them, though he may not be able to understand and appreciate these matters in all their bearings, as a person in sound and vigorous health of mind and body would be.

In determining the question of mental capacity, it is your duty to take into consideration the provisions of the will itself in connection with all the other testimony, and also the surrounding circumstances, not only as bearing on the question of mental capacity, but that of undue influence as well.

It is not necessary that the testator be shown to be technically insane; weakness of intellect or loss of memory, whether occasioned by disease or great bodily suffering or infirmity, or from all these combined, may render the testator incapable of making a valid will, provided such weakness of intellect or loss of memory, really and in fact, disqualified him from knowing or appreciating the consequences and effect of his act, and of fairly considering and weighing the just deserts of all the natural objects of his bounty. But weakness of mind and memory arising from any cause will not disqualify the testator from disposing of his property by will, unless such weakness goes to the extent of rendering him incapable of appreciating the nature and extent of his property, the rights and claims of those who are the natural objects of his bounty, and the nature and consequences of the will he is about to make.⁴

⁴ Newby, Judge, in *Graham v. Graham*, Highland County Common Pleas. See, as to testamentary capacity, definitions and general rules in harmony with charge. *Beach on Wills*, Sec. 97.

No. 648. Undue influence—What constitutes.—The proof of undue influence can very seldom be made by direct evidence, and the law does not require it; but the circumstances must be such as to lead justly to the inference that undue influence was employed, and that the will did not express the real wishes of the testator. You should look into the character of mind of the testator, his manner of living, the relations which he sustained to all the members of his family, and the provisions of the will itself. While the apparent inequality, or injustice, even in the provisions of a will are not of themselves a sufficient reason for annulling

the will, if otherwise valid, yet those provisions may present potent circumstances reflecting upon both the testator's capacity as well as the operation of influences upon his mind, though a mind perfectly rational and sound may be subject to control by influence from others. Therefore it is not necessary in proving undue influence or restraint. There should also be proof of incapacity, though the proof of one may tend to prove the other. While you may consider the provisions of the will, yet you must remember that it is not your province to pass upon the justice or the fairness thereof, but its provisions may be considered in connection with all the testimony and the circumstances surrounding the testator for the purpose of determining whether it has such existence. You are not at liberty to make a will for the testator, but simply to decide whether the one he has attempted to make is sanctioned by and fulfills all the requirements of the law.¹ To constitute undue influence and restraint it must appear that there was such influence and restraint as caused the execution of the will by the testator against his own desire in the matter. It must appear by a preponderance of the evidence that such undue influence and restraint was practiced with reference to the will, and must have affected or brought about the provisions of the will, or some of them. Unless it has in some manner affected the making of the will, or some of its provisions, it can not invalidate it. It must destroy the free agency of the testator. It is not required that any physical force should be used, but any restraint, or threats, or influence brought to bear upon the testator, or persistent importunities which he has not the strength to resist, if exerted so as to coerce him against his desire and purpose into making his will, or any of its provisions, is undue influence within the meaning of the law. It matters not how slight or how great the influence may be, so long as it destroys the free agency of the testator. It is immaterial what arguments, influence, or persuasion were brought to bear upon the testator, provided that in making his will he carried into effect his own will and intentions, and not those of another.

Any degree of influence over another acquired by kindness and friendly attention can never constitute undue influence within the meaning of the law.²

¹ As to unnatural dispositions, see Beach on Wills, Sec. 113.

² Newby, Judge, in *Graham v. Graham*, Highland County Common Pleas. As to undue influence, see Beach on Wills, Sec. 107 *et seq.*; Whitaker's Probate Code, 179.

No. 649. Same continued—What does not constitute undue influence.—It is not unlawful for a person by honest

intercession and persuasion to induce a will in his favor; neither is it unlawful to induce a testator to make a will in one's favor by fair speeches and kind conduct, for this does not amount to that kind of compulsion, improper conduct, or undue influence which, in a legal sense, would render the will invalid. To have such an effect it must amount to a moral force and coercion, destroying free agency. That which is obtained by argument, flattery, persuasion, and appeals to the affections, although influencing the testator's better judgment, does not necessarily vitiate the testator's will, unless his free agency be thereby destroyed, notwithstanding that but for such influence the will might not have been made. The test of the unlawfulness of the influence is its effect upon the testator's free agency. It must not be the influence of affection and attachment, nor the mere desire to gratify the wishes of another, but the undue influence and restraint required in order to render the will invalid must be of such a character and degree as to prevent the exercise of that discretion and judgment which are essential to a sound and disposing mind.

Undue influence, like incapacity, must be shown to exist at the time of making the will. To determine this you must consider all testimony, and look to the facts and circumstances occurring both before and after the execution of the will as reflecting, one way or the other, upon the question whether undue influence may or may not have existed, or operated upon the testator, at the time he made his will.

Newby, Judge, in *Graham v. Graham*, Highland County Common Pleas. Undue influence. Beach on Wills, Sec. 197 *et seq.*; Whittaker's Probate Code, 179, note.

No. 650. Declarations of testator admissible to show condition of mind.—The declarations of a testator made after the execution of his will are admissible only for the purpose of showing his condition of mind, and must not be used to prove the fact that undue influence or fraud were used to induce him to make the will in question, except in so far as they may evidence a condition of mind easily subjected to such influence at the date of his will. You must bear in mind, however, that the verbal statements, admissions or declarations should be received with great caution. The evidence, consisting as it does in mere repetitions of oral statements, is subject to much imperfection and mistake; the party testifying to them may be misinformed or may have misunderstood the testator. It frequently happens, also, that the witness by altering a few of the expressions really used,

gives an effect to the statement completely at variance with what the party actually did say.

Newby, Judge, in *Graham v. Graham*, Highland County Common Pleas. The declarations of the testator, made at about the time of executing his will, are admissible to show his capacity and the state of his affections. *Rule v. Maupin*, 84 Mo. 587.

No. 650a. Requisites of capacity to make will—Capacity to make will as affected by moral depravity—Influence over testator by others—Charge by Judge Longworth.—To make a valid will it is not enough that the testator shall subscribe his name to it in the presence of witnesses. He must do it intelligently and voluntarily. It is a matter of experience that juries sometimes set aside a will because they do not approve of its provisions. It is the right of every man, which right can not be taken from him, to do what he wills with his own, unless the disposition he makes violates some law; and after his death neither court nor jury have the power to make for him a disposition of his property different from the disposition which he intended to make, upon any theory that such intended disposition was unjust and wrong.

If, therefore, a man of sound and disposing mind chooses of his own accord to make a capricious, a foolish, or an unjust will, such will must stand, the simple question in such case being whether he was of sound and disposing mind at the time when he made it. If his mind at that time was feeble, perverted, or inert, whether weakened by age, excesses, disease, or other causes, that its action was not such as it would have been had the mind been in a natural condition and sound, so that the jury is satisfied that such action does not express *the real intent of a sound and disposing mind*, then the will, which is the result and product of such action, is not the last will and testament of the testator.

Everyone has observed that men in morbid conditions, where the brain is affected by disease, crazed by stimulants, or other causes, do things which at other times they would never have thought of doing, and for which they can hardly be held accountable, either in law or morally. In the eye of the law, a man's feelings, desires, and acts at such times are not considered to be the feelings, desires, and acts of the man.

Again, a man sometimes performs an act intelligently, but through feebleness of memory, is ignorant of some fact which if he had known would have caused him to act very differently. For example, suppose that one desires to divide his property equally among his children, and having three children, if so imbecile in memory as to suppose he has only two,

and divides the property between these two, such disposition should not be considered the will of the testator, because it clearly does not express his intentions.

To make a will a man must have capacity to know and understand what property he has, who would naturally receive it, and whom he selects to receive it; he must be able to hold in his mind his property, the persons to whom he gives, and those, if any, from whom he withholds; he must be able to understand his true relations to his property, and to the natural objects of his bounty.

If he is not able to understand and comprehend these things, then he is incapable in law of making a will.

It is a very difficult thing to enter into the mind of a man and see what is there. It is a difficult thing to determine definitely, from the testimony of others, the true character, thoughts, and feelings which have in times past been the moving-spring of action in one whose body is now turned to dust. Nevertheless, by the light which human testimony gives, the endeavor must be made.

In all cases like the one at bar, the first and not the least important item of evidence bearing upon the condition of the mind of the testator is the will itself, and although, as I have said, the fact that a will is unjust, or wrong, or absurd does not of itself prove the incapacity of the testator to make a will, yet it is an item of evidence for the jury to consider as bearing upon the question, and it is for the jury to determine what weight shall be given it.

Again, although mere moral depravity does not of itself unfit a man to make a will, yet a jury has a right to consider the fact of depravity in the testator, if satisfactorily shown, as a circumstance casting suspicion upon his soundness of mind.

The law does not declare that because a man is dissolute, passionate, unjust, and wanting the natural affection and parental instincts, and that he makes such a disposition of his property as he ought not to have made, these facts being found shall invalidate such disposition by will. I say the law does not declare that these things shall make his testament invalid, but it leaves to the jury, and to the jury alone, the right to say how much weight ought to be given to such facts, if they are found to be facts, in determining the condition of the testator's mind. The law very wisely provides that of these matters the jury shall be the sole judge. For whether strong or whether weak, no two human minds are exactly alike. The law does not pretend to furnish a foot-rule by which they shall be measured, but declares the few

simple rules which I have given to you, and beyond these leaves the determination of the facts to be governed by those principles of reason and common sense which direct the minds of all just and honest men.

We all know that there are degrees of moral depravity as various as the degrees of moral excellence and virtue, and it may be that moral depravity may result in a perversion of the feelings, affections, inclinations, temper, habits, and moral disposition, without any lesion of the intellect or reasoning faculties; and it may be true that some human beings exist who, in consequence of a deficiency of the moral organs, are as blind to the dictates of justice as others are deaf to melody; but whether such or a like condition of mind would amount to unsoundness, is a question of fact rather than law.

Mere depravity or wickedness, not amounting to mental unsoundness would not of itself, standing alone, affect the will of the testator.

It is claimed in this case that H. S. was a man morally depraved. I charge you that if you find that H. S. did not believe that any woman was virtuous; that all women were prostitutes; that they were created simply for the purpose of gratifying the lusts of man; that they were therefore able to support and maintain themselves out of the wages of sin; and that therefore no provision ought, in any case, to be made for them, and that, acting on this belief, he gave the bulk of his property to his son and not to his daughters, and that he made this disposition of his property by reason of this belief, then you would be justified in finding that his will is void.

However sound or strong the mind of a man might be in other directions, you would be justified in finding that the existence of such belief amounts to insanity or monomania.

I wish to impress upon you, however, what I have stated before, that to justify your setting this will aside upon such a state of facts as this you must be satisfied that such facts do exist, and of this you should be convinced clearly and satisfactorily. A less degree of moral depravity, although important as an item of evidence touching the question of soundness or unsoundness of the mind of the testator, would not of itself, standing alone, render him incapable of making a will; neither would this state of facts justify you in setting aside the will, unless you should find that they amounted to unsoundness of mind.

It is claimed that H. S. had, during his lifetime, suffered from severe attacks of disease; that he had been an intemperate drinker, and a man immoral and careless in all his habits of life; that he was peculiar and eccentric in his dress, his

speech, and his manner. All these facts, if you find them to be facts, you have the right to consider as circumstances bearing upon the question before you. His feelings, his sayings, his doings, the whole history of his life and death, as disclosed by the evidence, are proper testimony for your consideration, and you are the sole judges as to what and how much effect shall be given to any and all of them, keeping in view, however, that the question to be decided by you is narrowed down to this: do the papers purporting to be the will and codicil express the true desire and intent of the deceased, or, in other words, are they the act and product of a sound mind.

The next question for your consideration arises upon the claim of the plaintiff that at the time of executing these papers the testator was acting under undue influence exercised over him by C. S. and others.

A will must be the expression of the wishes and purposes of the party who undertakes to make it; his friends and family may talk with him, advise him, entreat him, and importune him. This they may do, but if, when this is done, he intelligently weighs what they say, and having capacity, intelligently makes up his mind, determines his own purposes and declares his own intentions, it is no matter whether his own mind, when made, agrees with their advice or not.

If it is his own choice or preference, it is no matter whether it originated with himself or was suggested by others. If deceived by fraud, coerced by threats, or worried with importunity, or influenced by the constant pressure of a dominant mind, which constrains him into the execution of such a will as he would not, of his own inclination, have made, then the jury may find that undue influence has been exercised over the mind of the testator.

But in such cases the test is always this: Is the will the expression of the intent of the testator, or of some other person? Is it his will, or the will which some other man has made for him?

These, gentlemen of the jury, are the two questions which you are called upon to decide, and the responsibility of deciding them truly and justly rests entirely upon you. There is a general conflict of testimony, and a great mass of evidence has been submitted to you. The witnesses seem to have described two different persons, the one corrupt, degraded, and depraved, possessing attributes of the brute rather than the man, and in whom all manhood, if it ever had existed, has ceased to exist; the other a man who, although perhaps not affectionate, desired to be just, and, though perhaps not spot-

less in life, had no other or greater failings than such as are incident to ordinary humanity, and possessed some virtues not common among men.

It is for you to determine all questions concerning the weight of the evidence and the credibility of the witnesses, using the rules of law, as I have given them to you, as a lamp to guide you in disentangling the complicated obstructions which you may find in your way.

Look first at the will. From the face of a coin you may infer the form of a die; when you read an anonymous manuscript, you may guess the author; when you see a footmark on the sand, you may conceive the animal that made it. So, from this will you may be able to infer something of the mind whose desires and interests it is said to have expressed; or you may find in it the expressions and desires of some other man than H. S. It is not the number of witnesses, but the weight of their testimony that should prevail with you, and of how much weight should be given to any testimony offered you are the sole judges.

If you find from all the evidence that the paper writings purporting to be the will and codicil of H. S. are the product of the action of a sound and disposing mind, as I have described it to you; that at the time they were executed by him he understood and knew of what property he was possessed, and the persons who would naturally receive it; that he comprehended and understood his true relations to his children, grandchildren, or other natural objects of his bounty, and that at the time of such execution he was not under any undue restraint or coercion, such as I have described to you, then you will find that these papers do constitute the last will and testament of H. S., deceased. If, on the other hand, you find he was unable to understand or comprehend those things at the time he executed these papers, or that he was unduly influenced or coerced to make the disposition of his property which he did make, then it is your duty to find these paper writings do not constitute the last will and testament of the said H. S.

Longworth, Judge, in *Amanda Joslyn v. Charles T. Sedam, et al.*, 2 W. L. B. 147.

No. 651. Nuncupative will.—Words written down not those spoken.—In a suit to test the validity of a nuncupative will, it is competent to prove that the testamentary words reduced to writing and probated are not the words spoken by the testator, and the following charge is, therefore, correct: If the evidence shows that the words actually spoken were

substantially the same as the words written down by the witnesses, that would be sufficient; but on the other hand, if the evidence should show that the words written down by the witnesses, as proved and probated, were not substantially the same as the words actually spoken, then the will could not stand, and their verdict should be for the plaintiff.

Bolles v. Harris, 34 O. S. 38.

The jurisdiction exercised by court and jury in trying contest of a will is virtually that of a court of probate, charged with the duty of finally establishing or rejecting the will. It is a proceeding *inter partes*. Mears v. Mears, 15 O. S. 96; Converse v. Starr, 23 O. S. 498; Bolles v. Harris, *supra*.

WORK, LABOR AND SERVICES.

No. 652. Services of child for parent—Question as to capacity of parent to make contract.—The case from which the extract from the charge is taken, was one where the son had been away from home for many years, but who was sent for when his father was taken ill. He came home, took care of his father for seven hundred and ninety-six days, and claimed recovery by reason of a contract which he made with his father. It was claimed by the personal representative of the father that the latter was an "imbecile and incapable of making a contract." Verdict was rendered against the plaintiff, which was affirmed by the Circuit and Supreme Courts. The court in its charge said:

It is claimed by plaintiff that he had been away from his father's home, doing for himself and family for about twenty-two years, for twelve years of which time, prior to the attack of paralysis, by which his father was afflicted, residing in the State of Michigan, and that upon the occurrence of the attack he was telegraphed to, and *at the instance and request of his father* that he immediately came to his father's house, and at the instance and request of his father, he being then helpless and wholly unable to get up or walk, or to help himself, or to attend to the wants of nature, and that during the space of seven hundred and ninety-six days, between the 8th day of June, 1886, and the 23d day of August, 1888, that he nursed and cared for his said father by handling, lifting and nursing and caring for him day and night during all that time, for which services he claims judgment.

To the claim of plaintiff thus set forth the defendant says that whatever services the plaintiff rendered in taking care of

and nursing his father, were done and performed by him as a son and member of his family, and without any promise of payment by his father, and without any expectations of payment for said services. (On the issue thus presented the rule is that where a son, during his minority, or even after his arrival of age, remains in his father's house, as a member of his father's family, and performs labor for his father without a promise of payment for the same by his father, that there can be no recovery. In other words, that unless there is a promise of payment by the father, and an expectation of payment by the son, there can be no recovery for services rendered by a son for his father, even after he becomes of age, while living with his father as a member of the family.)¹

In this case it is claimed by plaintiff that the above rule does not apply, for the reason that the plaintiff was away from his father's home twenty-two years, taking care of himself, and further that by reason of the imbecility of mind of his father, and his helpless physical condition, that he was compelled, of necessity, to perform for his father the services that he rendered, and that in such case the law implies a contract that he should be paid for his services.

You will look at all the testimony offered before you on this question for the purpose of determining in what manner the plaintiff lived there during his father's illness. Did plaintiff, at the time he rendered these services, render them as a gratuity and a member of his father's family? If he did, then there can be no recovery.

(a) *Capacity to make contract.*

On the other hand, I will say to you that if you find that J. N. was mentally incapable of making a contract for services for his care and nursing, and that such services were rendered by plaintiff, and that the same were necessary, and that, while so rendering them, plaintiff expected payment for the same, he would be entitled to receive payment unless you are satisfied from the testimony that plaintiff was, during the time said services were being rendered, a member of his father's family, treated in every respect by the family by being furnished with clothing, spending-money, and everything as a member of his father's family the same as was furnished to the other members of the family, and that he

¹ "It is well settled in Ohio that a child residing with his father as a member of the family is not entitled to recover for work and labor performed, or services rendered, in the absence of an express agreement to pay therefor, or its equivalent." Wright, 89 and 134; Pollock v. Pollock, 2 O. C. C. 143; Hawthorne v. McClure, 4 O. C. C. 13. In Ulrich v. Ulrich, 136 N. Y. 120, it was held that as matter of law no presumption that the services were gratuitous arises.

was so regarded and treated by the family, and that he so acted and demeaned himself and acted as a member of said family. But in such case, the plaintiff having been absent for a great many years, doing for himself, the burden is on the defendant to satisfy you that he became, while there waiting on his father, a member of his father's family. For this purpose you may look to the manner in which he, plaintiff, and the other members of the family all lived together and acted towards each other.²

² *Nesbitt v. Knoop*, error to C. C. of Miami County, No. 2942. In *Reando v. Mosplay*, 59 Am. Rep. 15 (Mo.), services were rendered for an insane parent. The court said that an implied contract might arise between an insane person and one furnishing necessities, and further charged that: "If you believe and find from the evidence in this case that plaintiff rendered the services sued for as acts of gratuitous kindness to her mother, and as a member of the family, with no intention of charging her for the same, then you must find the issues for the defendant, and in such case it makes no difference how meritorious and how valuable her service to her mother may have been." There is no controversy over the doctrine that where a child, though over age, continues to reside with his parent after becoming of age, and is treated as a member of the family, so long as that relation exists the law implies no promise to pay. *Miller v. Miller*, 16 Ill. 296; *Hart v. Hess*, 41 Mo. 441; *Wells v. Perkins*, 43 Wis. 160; *Adams v. Adams*, 23 Ind. 50; *Smith v. Smith*, 30 N. J. Eq. 564; *Wright's Rep.* 89, 133, 547, 751. Under such circumstances to entitle the child to recover, he must prove, by preponderance of evidence, an express hiring, or promise to pay, or circumstances from which a hiring or promise may be reasonably inferred. *Steel v. Steel*, 12 Pa. St. 64; *Hiblish v. Hiblish*, 71 Ind. 27. Again the doctrine that a lunatic (or imbecile) or his estate is liable for necessities supplied to them can not be denied. 5 *Lawson's R. & R.*, Sec. 2390, and numerous cases cited. See, also, *Sawyer v. Leufflin*, 56 Me. 308; *Reano v. Mosplay*, 90 Me. 251; *Blarsdale v. Holmes*, 48 Vt. 492; *Richardson v. Strong*, 55 Am. St. 430; *Jackson v. King*, 15 Am. Dec. and notes on p. 368; *Ex parte Northington*, 79 Am. Dec. p. 67, and notes on p. 68; *Young v. Stephens*, 97 Am. Dec. 592. An express promise to pay must, however, be shown where the parties live together as members of the same family, or facts from which the same may be inferred. *In re Perry's Estate*, 25 N. Y. S. 716. Circumstances may be so varied that in some cases the implied promise may arise, while in others not.

No. 653. Contract of service made by correspondence.—

If you find from the evidence that previous to ——— that plaintiff and defendant had correspondence by mail, and that defendant, in a letter to and received by plaintiff, proposed to hire plaintiff to labor for him for a year at a stated price, and that plaintiff, in a letter written to and received by defendant, accepted said proposal without condition or reserve, then I say to you that such a letter would constitute in law a written contract between plaintiff and defendant to labor for one year.

In construing the letters, the whole correspondence, promises and inducements held out should be considered the subject-matter and the parties, and from the whole a reasonable conclusion be derived; and where one party is old, able,

adroit in the use of language and promises, and the other young and inexperienced in the use of language, and a minor, a court will not strain the rules of construction against such minor, and in favor of the older, experienced one, especially where such construction would result in gross injustice to the minor.

From *Easthope v. Fordyce*, Supreme Court, unreported, No. 2910. Affirmed.

No. 654. Contracts, express or implied—Proof of.—Contracts are either express or implied. In general, the only difference between an express and an implied contract is the mode of proof. An express contract is proved by evidence of the express words used by the parties. An implied contract is established by proof of circumstances showing either that in justice and honesty a contract ought to be implied, or that the parties intended a contract. Whether the contract be established by evidence, direct or circumstantial, the legal consequences must be the same.

Voris, Judge, in *Fairbanks v. Otis*, Summit County Common Pleas.

No. 655. Same continued—Contract for services when implied.—The law usually implies that, where services are accepted or other valuable thing is received, the party accepting has agreed to pay for them. This, however, is a mere presumption that varies with the circumstances, and when services are rendered by one member of the family to another, this presumption does not hold, in which case the parties must resort to evidence to establish the presumption of an obligation to pay therefor; but this presumption is one that varies with the circumstances and is to be determined by the understanding either express or implied between the parties as developed by the evidence submitted to you. But the mere fact that plaintiff rendered such services to a sister in and of itself does not raise the presumption of an implied contract to pay. If you are satisfied by a preponderance of the evidence that no contract, either express or implied, was entered into between the decedent and plaintiff, this would end the case, and your verdict should be for the defendant.

Voris, Judge, in *Fairbanks v. Otis*, Summit County Common Pleas.

No. 656. Contract for services—Continued—Relation brother and sister—Parent and child—Rule.—The rule is well settled that where the relation of parent and child, or brother and sister exists, the law will not presume any other, that is, the law will not presume that of debtor and creditor.

In order to establish the inferior relation of debtor and creditor between a parent and child, or brother and sister, there must be proof more or less strong, but sufficient to carry conviction, that the parties understood the inferior relation, to wit: that the parties contracting to subsist between them at the time an agreement in reference to it is entered into.

If you should find that the decedent promised to pay the plaintiff for the services, you may presume that a contract was entered into to perform the services. To enable the plaintiff to recover, a preponderance of the evidence must show a promise to pay, or that the decedent expected to pay for the services, or that the decedent could not, in justice or good conscience, receive the same and not pay therefor what they were reasonably worth, and that the plaintiff expected to receive compensation for his services.

For this case, I will say to you that there must be evidence to rebut the presumption that what was done by the plaintiff for her sister was gratuitously given and received, so that if you find from the evidence that the services were gratuitously given, as an act of sisterly duty and affection merely, and no request and no promise to pay, or that the circumstances accounted for her conduct on grounds more probable than that of the promise of recompense, no presumption of a contract will be implied. But if you find from a preponderance of the evidence that the circumstances were such as required extraordinary and continuous services of substantial value, the presumption that the services were gratuitously rendered to a sister would not necessarily obtain, and we leave it for you to say, under all the circumstances provided, whether the services and the items of the account rendered were intended to be gratuitously given. If gratuitous, you should find for the defendant; if not, you should find for the plaintiff.

Voris, Judge, in *Fairbanks v. Otis*, Summit County Common Pleas.

No. 657. Performance of services — Request for—How proven—Promise implied when—A complete charge as to services rendered by grandchild to grandparent.—The plaintiff alleges in her petition that these services were performed at A. S.'s request. Such request, gentlemen, need not be proven by direct and positive evidence; a request to perform services may be implied from facts and circumstances proved on the trial of a case. If a man accepts valuable services from another, and receives the benefit of them, the law implies a request upon the part of the person receiving such services for the other to perform the same. And in this case, gentlemen, you would be warranted in implying a request upon the

part of A. S. for the plaintiff to perform the services that she did perform. It is admitted here that the services were performed, and it is admitted they were of value, and from these facts the law will warrant you in implying a request upon the part of S. for the plaintiff, Mrs. C., to perform these services. But to go further, was there an implication? Does the law imply a promise from the facts and circumstances proved on the trial of this case on the part of S. to pay their reasonable value? Ordinarily where there is a request to perform valuable services, and when they are performed in pursuance of such request, the law will imply a promise upon the part of the person receiving the benefit of such services—a promise to pay their reasonable value—unless there has been something shown—some facts and circumstances shown—that negative any implied promise upon the part of the person receiving the services to pay their reasonable value.

(a) *Circumstances negating promise—Gratuitous services—Relation of parent and child.*

Now, in this case, gentlemen, it is claimed there are circumstances surrounding the performance of these services that negative any implication upon the part of S. to pay for the same. It is claimed that the plaintiff here entered the family of A. S. when she was about eleven or twelve years of age; that she continued to reside in his family as a member of the same, performing the services claimed in the petition up to and including her twenty-fourth year. It is claimed that during the time she was in this family she was not only a member of it, but was treated as a member of the family, and that her boarding, clothing, and lodging were furnished her by A. S. It is admitted that the plaintiff was the granddaughter of defendant's testate, A. S. It is claimed here by the defendant that these circumstances negative any implied promise upon the part of A. S. to pay for the same. Services performed at the request of another, while they may be valuable, and while they may be beneficial to the person who receives them, may be performed under such circumstances as that the law will imply that they were gratuitously performed; that the law will imply that the party who performed them never intended to make any charge for the same, or never expected any compensation for the same. Where a person sustaining the relation of a child to a parent performs valuable services, and during the time of the performance of the same is a member of the family, receiving his board, his clothing, his lodging, and his nursing, if he became sick during that time, the law presumes that such services were gratuitously performed, and that there was no expectation

upon the part of the person performing the same that the person for whom they were performed would pay him. The law presumes under such circumstances that such services were gratuitous, with no expectation of receiving any compensation therefor. Now, gentlemen, in this case the evidence, in order to sustain the contention of the plaintiff in this case, must sustain the claim that the services were not rendered under the ordinary relation of parent to a child, or parent to a grandchild, or debtor to a creditor, or master and servant. You must look to all the evidence in determining this case; look to what you have heard told upon this witness-stand. Was this girl a member of that family? Was she treated as a member of that family? Was she treated as the other daughter was treated? Look to all the evidence in determining that; was she provided for as the other daughter? Was she provided for as the daughter of a man in the circumstances of A. S.—in the circumstances in which he then was—usually provides for his daughter? Was what she needed and what was necessary for her condition and station in life provided for her by A. S. during the period she claims to have performed these services?

You are, gentlemen, to determine this question from the evidence, and from the evidence alone. If you shall find from the evidence in this case that she entered this family as a member of it, and was treated in all respects as a member of the family—as a daughter; if S. provided for her clothing, board, lodging, nursing, and medicine, if it was required, then in that case the law raises the presumption that these services were gratuitously performed.

But if, upon the other hand, you find in this case that she was not a member of the family; that she was not treated as a member of his family, and S. did not furnish her with what would be necessary, if a member of the family in that behalf, then, in that case, the law raises no presumption that these services were performed gratuitously. And if they were performed at the request of A. S., then, in that case, the law implies a promise upon the part of S. to pay their reasonable value. And even, gentlemen, if you shall find that this plaintiff went into this family and resided there as a member of the same, being treated as such, and being provided with clothing, food, lodging, nursing, and medicine, and everything that was necessary, yet in this case you find that A. S. expressly promised to pay her a reasonable value for her services, then, in that case, she had a valid and subsisting claim at law against defendant's testate.

John B. Driggs, Judge, in *W. N. Stilwell v. Cowans*, Belmont County, S. C. 3785. Settled while in Supreme Court. Affirmed by Circuit Court.

No. 658. Contract for services by railroad employee and railway corporation.—In this action the plaintiff claims of the defendant, the — R. R. Company aforesaid, for services rendered by him as flagman at O. Street crossing in M., this city, from the first day of January, 1885, to the first day of January, 1886, in the sum of \$299, as they are reasonably worth, for which he asks judgment.

The defendant answering, denies each allegation of liability for said services, and their alleged worth, and that he labored as flagman during all the time averred, and further claims that plaintiff was paid and satisfied for said services under a special contract for the services aforesaid, together with his services as switchman at said locality at the wages of forty dollars per month, which was all both said services were worth.

Plaintiff replying, denies said payment and satisfaction and said special contract, and that both services were only worth forty dollars per month.

To find in favor of the plaintiff his claim must be proved by a preponderance of the evidence in the case. That is, the evidence in his favor must, by reason of its weight and importance, in your minds, outweigh all other evidence to the contrary. If the evidence for and against the claim just balances, or if the evidence against the claim preponderates over, or, in other words, outweighs the evidence for the claim, you should find for the defendant.

To entitle the plaintiff to recover, there must have been a contract between him and the defendant, through its agent, express or implied, for his services as flagman.

An express contract is proved by evidence of the express words of the parties, or authorized agents for the purpose. An implied contract is established by proof of circumstances showing that either in justice or honesty a contract ought to be implied, or that the parties intended to contract, and whether the contract be established by evidence direct or circumstantial, the legal consequences resulting from the breach of it must be the same.

The defendant being a corporation, only acts through its agents duly authorized. If the plaintiff performed the services of the flagman at the defendant's request, or with its knowledge and consent, and the latter voluntarily took the benefit of such labor, then the law presumes that he will be paid for his labor, unless the contrary is shown by the evidence. And if no special contract is proved, fixing the price, then he is entitled to have what his services are reasonably worth. And if you find these facts by the preponderance of

the evidence under the rules given, your verdict should be for the plaintiff; otherwise for the defendant.

If you find by the preponderance of the evidence that the plaintiff, under a special contract, express or implied, as hereinbefore defined, performed services as flagman and switchman both, at the wages of forty dollars a month, and that he has been fully paid therefor, your verdict should be for the defendant; otherwise, and finding by a preponderance of the evidence the flagman's services to have been performed as under my last instruction stated, your verdict should be for the plaintiff.

The credibility of the testimony and the weight of the evidence are for your determination; the facts are exclusively for you, but the law governing them you will take implicitly and exclusively from the court, as embodied in this charge. The court is responsible for the law.

Your verdict should be in writing, signed by your foreman, whom you will select from your number. If you find in favor of the plaintiff, it should be for the amount found due, with interest thereon from the 18th day of February, 1887, the date of the commencement of the suit before the Justice of the Peace, and the 5th day of December, 1887, the latter being the first day of the present term.

May, Judge, in Penn. Co. v. Vandevender.

No. 659. When mother entitled to custody of infant and to make contracts for its services—Contract for services and for maintenance and schooling of minor not to be performed in one year.—In this action, W. M., plaintiff, sues J. B., defendant, and makes claim that there is due him from the defendant the sum of \$900.00, consisting of five annual installments of \$180 each, with interest respectively from April 4 of successive years, beginning with '80 and ending with '85, for work and labor performed by said M. at said B.'s request, as per account in the petition set forth. The defendant answering, denies each allegation of liability in the petition contained. And further, defendant makes claim that plaintiff's demand for said work and labor was satisfied in the fulfillment of an oral contract made by M. M., plaintiff's mother, with defendant for plaintiff's benefit, whereby said W. M. was to do said work and labor, beginning when he was about five years old, and ending his services on the fourth day of April, 1885, when he would be twenty-one years of age, in consideration of which said B. agreed to maintain plaintiff and give him a good common school education during such service, and at the termination thereof to

furnish him a good suit of clothes, and that defendant performed every stipulation of said contract on his part.

In reply the plaintiff denies each and every averment as to contract and its performance by the defendant. The claim of a party is supported by a preponderance of the evidence when the evidence in its favor, by virtue of its weight and importance in your minds, outweighs all other evidence to the contrary. In general, the mother as against the father is entitled to the care and custody of their child at such tender age of five years, and if the husband has deserted the wife, or neglects to provide for his family, she may make contracts as to the labor of such minor child, and if a contract is made for the sole benefit of a minor, or she allows him his earnings during minority, he may sue in his own name, if necessary on coming of age, for his wages.

However, no action can be brought upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement is in writing signed by the party to be charged therewith, or by his or her authority. So, if there was a contract for the maintenance and schooling for the service of plaintiff with defendant until said W. M. should come of age, beginning when he was about five years or fourteen years old, which agreement or contract was not in writing signed by the parties to be charged, neither could enforce the performance, or sue for a breach thereof by action. Yet the contract, though not enforceable, is not void, for if both parties have fully performed the contract, a court will not interfere between them. If the plaintiff performed the contract on his side, if there was one, and the defendant has not fully performed the contract on his part, said M. would be entitled to recover the reasonable value of his unpaid services from April 4, 1880, though he would not be so entitled to recover if said B. did all he agreed to do under the contract. If, therefore, under the rules I have given, you find by a preponderance of the evidence that the plaintiff, under a hiring for his benefit while yet a minor, performed work and labor still unpaid for, and at the request of defendant, from April 4, '80, until said M. was twenty-one years of age, your verdict should be in favor of the plaintiff for as much as said work and labor may be shown to be reasonably worth, under the evidence and circumstances. Otherwise, or notwithstanding you may find that said M. accomplished said work and labor, if you further find by a preponderance of the evidence that said services were performed under a special contract whereby, in consideration of the same and during the time in question, said B. was to furnish plaintiff subsist-

ence and a good common school education, and at the latter's coming of age, a good suit of clothes, and that the defendant fairly performed each and every part of this contract, or of whatever the contract may have been, your verdict should be for the defendant.

M. May, Judge, in *Brubaker v. McGuire*, 51 O. S. 624. Judgments affirmed.

No. 660. Growing trees and fences constructed upon ground allowed to be used for public highway—Rights of owner and public—Trespass or nuisance (?)—"Whilst the supervisor might at any time have caused and directed the road to be opened its extreme width, yet he was not bound to open the same wider than the convenience of the public in fact required. The trees growing, and the fences constructed upon the ground allowed to be opened for public use as a highway, remain the property of the owner of the fee, and if they existed within the limits of the new road at the time of its establishment, the owner is under no special obligation to remove the same; nor will the sufferance of their continuance make them a nuisance, so as to authorize a private person, unauthorized by the supervisor, to remove the same, unless they in fact subject him to a substantial and material hindrance and inconvenience in the exercise of his right, in common with other citizens, to the use of the road as a public highway. An authorized road once opened, or, in fact, used by the public as a highway, becoming obstructed so as to work a positive inconvenience or damage to a citizen in its proper use, such obstruction may be summarily removed with impunity by the act of such citizen.

"If the jury shall find in this case that the defendant, in entering upon the plaintiff's close, was the supervisor of the road district in which such lands lay, or was duly authorized by such supervisor to enter upon such land for the purpose of opening or widening such highway, and that the hedge, bushes, or fence removed were within the limits of such authorized highway, and even in the opinion of the supervisor an obstruction in the way of the public use of such ground for the purpose of such highway; or if the jury shall find that prior to the alleged trespass the public had been in the peaceable enjoyment and use of said grounds covered by said hedge or fence, and that the existence of the same was a hindrance to the enjoyment of such highway, and that the defendant, in removing the same, was guilty of no wanton or unnecessary injury to the owner of such property, then, and in either case, your verdict should be for the defendant. Whatever

hurts, annoys, inconveniences or damages a person in the enjoyment of a right, is a nuisance in its general acceptation. As applied to this case, whatever hindered or inconvenienced the defendant in his right of transit over the road in question may be regarded as such nuisance.

"If the jury should find that the hedge row stood within the limits of the public highway forty feet wide, and within ten feet of the center of the same, it was, *prima facie*, a nuisance, and the defendant had the *prima facie* right to remove it, doing no unnecessary damage.

"If the road had been opened and used after having been established, it makes no difference whether a formal order had been issued by the commissioners or not; the use of such road after such establishment would be an appropriation by the public, and would entitle the defendant to remove any nuisance which he might find upon the same; that to entitle the defendant to cut down the bushes in the road, it was not necessary that he should be hindered or inconvenienced in his passing along the same."

From *Phifer v. Cox*, 36 O. S. 248.

No. 661. Drunkenness as an excuse for a crime.—

"Drunkenness is no excuse for crime. Crime, when all of the acts of the hand and mind which constitute it actually exist, is not the less criminal when committed by a person intoxicated. Yet, nevertheless, when purpose, premeditation, and deliberation are necessary ingredients of the crime, as in murder in the first degree, evidence of intoxication is admissible, and proper to be taken into consideration by the jury, to determine the question as to the intent, and premeditation and deliberation. But drunkenness is a distinct and substantive fact, and when set up by the defendant as bearing upon these ingredients should be satisfactorily shown by testimony to have actually existed, and that it was not simulated or assumed, it must not be left to mere conjecture or assumption. Unless the drunkenness is shown to have been to such an extent as to destroy the reasoning faculties for the time, that is, that accused was so drunk that he did not know what he was about, it is not entitled to great weight. . . . If the jury find . . . that the killing was done while the defendant was drunk, and in a moment of passion, . . . these are proper circumstances to be considered by you in order to determine whether the killing is manslaughter or not . . . If the defendant was suffering from an attack of the *delirium tremens*, or total deprivation of his mental faculties, . . . superinduced by intoxication, . . . this exempts the

defendant from responsibility for crime, like insanity produced by any other cause.

From *Davis v. State*, 25 O. S. 369. "Intoxication is no defense to a prosecution for crime; but in some cases evidence of intoxication is admissible to show that no crime has been committed, or to show the degree or grade of a crime; and in the prosecution for maliciously shooting with intent to wound, evidence that the defendant was so much intoxicated that he could not form or have such intent, is admissible. *Cline v. State*, 43 O. S. 332.

No. 662. A house of ill fame defined—Harboring a female of good repute in—"Harboring" defined.—A house of ill fame is alleged to have been kept by this defendant, and that means she was the keeper of a house which persons of opposite sexes commonly used and resorted to for purposes of prostitution and lewdness. Whether or not it was such a house at the time named in the indictment you have a right to take into consideration the general reputation in the neighborhood where she lived as well as the testimony of any witnesses, including defendant herself, and determine from the whole proof whether or not at the time named in the indictment this defendant was in fact the keeper of a house of ill fame.

The indictment speaks of harboring a person, which means shelter afforded and a place of asylum furnished to such persons as came to her, and if you find from the proofs of the case at the time named in the indictment that this defendant furnished A. B. and C. D. a room to stay in for the purpose of lewdness you may find for the purposes of this case she was harbored.

Henry Collings, Judge, in *State v. McCandless*, Scioto County Common Pleas. Approved by Circuit Court at March Term, 1897. The indictment was brought under Vol. 92, O. L. 207, and the defendant charged with harboring a female person of good repute for chastity under 18 years.

No. 663. "Good repute for chastity" defined as used in 92 O. L. 207.—It is charged in the indictment and for certain purposes it must appear that the woman therein named, A. B., at the time of the occurrence alleged in the indictment was a person of good repute for chastity, which is to say that among the people who knew her in the community where she lived and that persons with whom she associated knew her general reputation for chastity, morality and womanly behavior was not questioned or suspicioned. In order to determine whether or not, at the time of the occurrence alleged, she was a person of that repute, you have a right to take into consideration the testimony of the persons who were acquainted with her and with whom she associated, and

what they say about her general standing and reputation in the community where she resided, as well as the conduct of the woman herself, and determine from the whole proof whether or not she, at the time of the occurrence, was a person whose standing and reputation for chastity where she lived was good. If you find that to be a fact, then you may say she was a person of good repute for chastity.

Henry Collings, Judge, in *State v. McCandless*, Scioto County Common Pleas. Approved by the Circuit Court, March Term, 1897. The indictment was brought under Vol. 92, O. L. 207, amending R. S. Sec. 7023, and the defendant charged with harboring a female person of good repute for chastity under 18 years of age.



JUDGMENT ENTRIES IN
THE COMMON PLEAS, CIRCUIT,
AND SUPREME COURTS.

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PARTIES TO ACTIONS.

See INTERPLEADER.

(*R. S. Secs.* 4993—5018.)

No. 763.

Entry substituting Real Party in interest and dismissing others who have disposed of interests to those substituted—Ordering necessary Parties to be made Defendants.

[*Caption.*]

This cause coming on to be heard, and it being made to appear to the court that since the bringing of this suit the said plaintiffs, C. and W., have disposed of their interest in this action to W. D., one of the defendants herein, and that the said W. D. is now the real party in interest herein, and the said C. and W. should be dismissed. It is therefore ordered that the said C. and W. be dismissed from this action, and that the defendant, W. D., be substituted as a plaintiff herein, and this action proceed in his name to final judgment and abide the event of this suit. And thereupon, on motion of said D., and it appearing that one G. K. is a necessary party defendant herein, it is ordered that he be made such defendant, and that process issue in this action in due form of law.

As to real parties in interest, *R. S. Sec.* 4993; *Kinhead's Code* Pldg. *Sec.* 8.

No. 764.

Assignee substituted for Plaintiff.

[*Caption.*]

This day came the above-named plaintiff by his attorneys, and also came G. P. D. by his attorneys, and it appearing to the court that J. H., in whose name this action was brought, has, since the above case was brought, and came to issue, assigned all his interest in the subject-matter to G. B. D. for the benefit of the creditors of said J. H.,

and that the said G. B. D. is now the duly appointed and qualified assignee of said J. H., and that said G. B. D., as such assignee, is the real party in interest, it is on motion of said G. B. D. ordered that he be and he is hereby substituted for the said J. H. as plaintiff herein, and the said G. B. D., as such assignee, has leave to file a supplemental petition herein, and the same is herewith filed.

No. 765.

Appointment of Guardian ad litem.

[*Caption.*]

This day this cause came on to be heard on motion of plaintiff to appoint a guardian *ad litem* for the minor defendants in the above-entitled case, and it appearing to the court that M. H. H. and C. H. are minor defendants, and that they have been duly served with summons, and that M. H. is of the age of fourteen (14) years, and has not applied for the appointment of a guardian *ad litem*, although more than twenty (20) days have elapsed since the return of said summons upon her.

On application of the plaintiff it is ordered that L. G. A. be appointed guardian *ad litem* for said minor defendant, and thereupon said L. G. A. in open court accepts said appointment.

Whittaker's Civil Code, Sec. 5004. The entry must show acceptance by the guardian. 3 Ohio, 355.

No. 766.

**Entry making Party Defendant claiming interest under
R. S. Sec. 5006.**

[*Caption.*]

This day came A. B., representing to the court that he has an interest in the above-entitled cause adverse to the plaintiff, and moved the court for leave to be made a party defendant herein, and the court upon careful consideration, and being satisfied that said motion is well taken, doth therefore sustain the same, and does hereby allow said A. B. to be made a party defendant to this action, and does allow said A. B. — days within which to file his pleading.

No. 767.**Entry allowing Party to come in as Co-plaintiff.**

[*Caption.*]

This day came C. D., and representing to the court that he has an interest in the subject of the action, and in obtaining the relief demanded, and moved the court for leave to be joined as a party plaintiff to this action. And the court, upon due consideration, finds that said motion is well taken, and doth therefore order that the said C. D. be and he is hereby allowed to come in and be and hereby is made a plaintiff in this action with said C. D., original plaintiff; and that all orders heretofore made, and all proceedings in this action, shall stand as the orders and proceedings of this court herein, and that this action proceed in the same manner and with the same force and effect as if the said A. B. had been made party plaintiff at the commencement thereof, and that the said summons, petition, and all orders and proceedings herein be and are hereby amended by adding their names as plaintiffs herein.

Whittaker's Civ. Code, Sec. 5005, and notes. Attaching creditors may join as plaintiffs in an action upon an attachment bond. 10 O. S. 478.

No. 768.**Ordering necessary Party to be made Defendant under
R. S. Sec. 5006.**

[*Caption.*]

Upon motion of plaintiff, and it being made to appear to the satisfaction of the court that A. B. is a necessary party to a complete determination of the questions arising in the above-entitled action, it is ordered that said A. B. be and he is hereby made a party defendant herein, and it is also further ordered that service of summons be made upon him according to law.

This may also serve the purpose under R. S. Sec. 5013.

No. 769.**Making new Parties without Motion.**

[*Caption.*]

It appearing to the court that a complete determination of the controversy in this action can not be had without the appearance of one A. B. herein, it is therefore by the court

ordered, on its own motion, that said A. B. be and he is hereby made a party defendant, and that he be brought into court by service of summons according to law. (And the clerk of this court is directed to issue a summons for said defendant, directed to the sheriff of this county, indorsed "——" returnable according to law.)

Whittaker's Civ. Code, Sec. 5013.

No. 770.

Substitution of Successor in Administration.

[*Caption.*]

It being made to appear to the court that A. B., the former administrator [*or*, executor] of the estate of C. D., deceased, is now deceased, and that E. F. has been appointed as administrator of said estate of C. D., deceased, and is now the duly qualified and acting administrator of said estate, it is hereby ordered upon motion of said E. F. as such administrator, that he as such administrator aforesaid be and he is hereby substituted as plaintiff in this action in place of A. B., the former administrator [*or*, executor] of such estate, and that this action be continued in the name of the said E. F. as administrator as aforesaid, as plaintiff in this action; and that the name of E. F. as aforesaid be substituted in the name and place of said A. B., now deceased, upon the record herein, and that the pleadings herein, and the proceedings already had and taken in the cause, stand as the pleadings, proceedings and evidence in the cause hereby revived and continued as aforesaid.

30 Hun. 444.

No. 771.

Dismissal without Prejudice for want of necessary Party.

[*Caption.*]

It having been made to appear to the satisfaction of the court that A. B. is a necessary party to the above-entitled action, and that a determination of the controversy herein can not be made by the court without the presence of the said A. B.; and it further appearing that the said A. B. has not been made a party to this action, the same is hereby dismissed without prejudice at the costs of plaintiff.

R. S. Sec. 5013.

No. 772.

Making Party having interest in action for recovery of real or personal property under R. S. Sec. 5014.

[*Caption.*]

It being made to appear to the satisfaction of the court that A. B. has an interest in the property involved in this action, he is hereby made a party defendant herein with leave to answer by —.

No. 773

Substitution of Plaintiff in execution for Officer.

[*Caption.*]

This day came J. R., sheriff, and represented to the court that he took possession of the property in controversy in this action by virtue of an execution [*or*, on writ of attachment] duly issued out of this court in the case of A. B., plaintiff, against C. D., defendant, and that he holds said property by virtue of said writ. It is therefore upon motion of said sheriff ordered that the said A. B., plaintiff in said action, wherein said execution was issued, be and he is hereby substituted as the defendant in place of said sheriff, and that the pleading and process herein stand amended accordingly.

Whittaker's Civil Code, Sec. 5018 and notes.

No. 774.

Ordering Parties brought in where obligation is joint.

[*Caption.*]

It having been made to appear to the court that the claim upon which this action is based is a joint obligation signed by A. B., C. D., E. F. and G. H., and that only A. B. and C. D. are made parties hereto and have been served herein, and that E. F. and G. H. are necessary parties herein, and that this cause can not be determined without their presence herein, it is therefore ordered that the said E. F. and G. H. be and they are hereby made parties hereto, and the clerk is ordered to issue a summons for them directed to the sheriff of this county according to law.

JOINDER OF ACTIONS.

(*R. S. Secs. 5019—5021.*)

Under this division of the Code, demurrers may be filed for misjoinder, and the entries thereon may be found under demurrer. Where two causes of action are commingled together, a motion to separately state and number may be made, and entries regarding this are found on page 519. If two counts are inconsistent a motion requiring an election may be made; but if two causes of action are inconsistent, demurrer is the remedy. Kinkead's Code Plg., Sec. 21, p. 23, p. 18. Or the court may treat the additional one as surplusage. *Id.*, p. 18. This leaves practically nothing to be placed in this division except what follows.

No. 775.

Entry Requiring an Election.

[*Caption.*]

This day came C. D., defendant herein, and moved the court to require the plaintiff to elect between the first count in his said petition and the second count therein, upon which he will proceed to trial. And the court, upon due consideration thereof, finds that the said two counts are inconsistent, and doth therefore order that said plaintiff, within — days from date hereof, elect upon which count he will proceed to trial, and that in default of so electing the said (first or second) count in said petition be stricken out.

No. 776.

Entry upon motion to compel Plaintiff to elect upon which cause of action he will proceed.

[*Caption.*]

This cause came on to be heard upon the motion of the defendant, L. B., to compel the plaintiff to elect upon which cause of action set forth in her petition and amendment to the petition she will proceed to trial, whether upon the foreclosure of her mortgage against D. S. B., or for a personal judgment against said L. B., and the court does sustain said motion, and thereupon the plaintiff elected to proceed on her cause of action against D. S. B. and the other defendants, for the foreclosure of her said mortgage, and thereupon the

court does dismiss said second cause of action in the supplemental petition, so far as the same relates to the recovery of a personal judgment against L. B.

From *Shafer v. Benton*, Delaware County. The prayer of the petition may in such case operate as an election. Kinkead's Code Pldg, Sec. 21, p. 22. The foregoing entry is taken from the above case, but it does not seem consistent with the rules of procedure. Kinkead's Pldg, Sec. 21, p. 23. It might be made by agreement, and we therefore give it.

VENUE OF ACTIONS.

(*R. S. Secs. 5022—5034.*)

No. 777.

Venue—Judgment on Demurrer on answer that property sought to be recovered is not within jurisdiction of the Court, under R. S. Sec. 5022.

[*Caption.*]

This cause came on to be heard upon the demurrer of the defendant to the petition, was argued by counsel, and it appearing to the court that the property sought* to be recovered in this action is not within the jurisdiction of this court, the court finds said demurrer well taken and does therefore sustain the same.

[*Where petition in partition is filed and demurrer sustained, proceed as above to *, then proceed:*]

To be partitioned in this action is not within the jurisdiction of this court, the court finds said demurrer well taken and does therefore sustain the same.

[*Where petition in foreclosure is filed and demurrer sustained, proceed as above to *, then proceed:*]

To be foreclosed under said mortgage [*or, lien*] is not within the jurisdiction of this court, the court finds the same well taken and does therefore sustain the same.

[*Where the petition discloses upon its face a wrong venue the error is corrected by demurrer. If it does not so appear from the face of the pleadings, the defect is remedied by answer.*]

Kinkead's Code Pleading, Sec. 94.

No. 778.

Venue—Order for Change of.

[*Caption.*]

This cause came on to be heard upon the motion of W. K. B., for a change of venue of the above action, and it appearing to the court from the evidence that a fair and impartial trial of this cause can not be had in this county, it is ordered * that the place of trial of this cause be and the same is hereby changed to the county of —, and state of Ohio.

The clerk of this court is therefore directed to transmit to the clerk of the Court of Common Pleas of — county, Ohio, the pleadings and papers in this case, together with a duly certified copy of this entry.

No. 779.

Venue—Change of in case of Corporations under
R. S. Sec. 5033.

[*Caption.*]

This cause come on to be heard upon the motion of C. D. B., for a change of venue of this action, and it appearing to the court from the affidavit of C. D. B., and the several affidavits of five credible persons residing in said county of —, sustaining said affidavit, that the said The W. D. B. Company is a corporation, having fifty stockholders, who are residents of said county, and having its principal office in said county [*or*, transacts its principal business in said county].

It is therefore ordered, etc. [*proceed as from * in No. 778*].

No. 780.

Venue—Stay of Proceedings against Member of General
Assembly under R. S. Sec. 5034.

[*Caption.*]

This cause came on to be heard upon the motion of W. L. B., and it having been made to appear to the full satisfaction of the court that the said W. L. B. is a member [*or*, officer] of the senate [*or*, house of representatives] of the state of Ohio ; that this county is not the county of

his residence, and that the cause of action occurred ten days before the — day of —, 18—.

It is therefore ordered that all further proceedings in this action against the said W. L. B. be stayed during the present session of said General Assembly, and for — days thereafter.

No. 781.

Entry ordering Change of Venue in Criminal Case.

[*Caption.*]

This day this cause came on to be heard upon the motion heretofore filed herein by the defendant for a change of venue, and the court, being fully advised in the premises, finds from the affidavit filed herein that a fair and impartial trial can not be had in this county. It is therefore ordered that a change of venue be granted, and it is hereby directed and ordered that the said cause be taken to the adjoining county of —. It is further ordered that the witnesses for the state enter into a recognizance to appear before the court of common pleas of said — county at —.

R. S. Secs. 7264—7266.

SERVICE OF PROCESS.

(R. S. Secs. 5035—5056.)

No. 782.

Ordering Service by Publication upon unknown Heirs—a very complete Entry.

[*Caption.*]

This day came the plaintiff and filed in this court his petition herein, and therefore came the plaintiff and further filed herein an affidavit under the statutes in that behalf and for the purpose of procuring proceedings herein against the unknown heirs of C. A. without naming them, and also an affidavit under the statutes in that behalf for service herein on said unknown heirs by publication. Upon consideration whereof, and being fully advised in the premises, and finding that the heirs of C. A., deceased, are necessary

parties hereto and herein, and that a full and complete determination and adjudication of the questions and issues herein involved can not be had without their presence herein as parties hereto, it is ordered that the action proceed against the heirs of said C. A., deceased, without naming them, and in form and manner as in the petition set forth and as provided by law. And it is therefore further ordered that publication be made by the plaintiffs for the unknown heirs of C. A., deceased, for six consecutive weeks in a newspaper, printed, published and of general circulation in said _____ county, Ohio, which publication shall contain a summary statement of the object and prayer of said petition, mention the court wherein it is filed, and shall notify said unknown heirs when they are required to answer. And upon compliance with the order aforesaid this cause shall proceed against the unknown heirs of the said A. C., deceased, without naming them, and in all respects as provided by the statutes in that behalf.

The clerk of this court is ordered to place this entry upon the journal of this court.

R. S. Secs. 5049, 5050.

No. 783.

Ordering Service by Publication where Parties Unknown—Short Entry.

[*Caption.*]

This cause coming on to be heard upon the affidavit of the plaintiff that the residence of the defendant is unknown to plaintiff and can not by reasonable diligence be ascertained, and it appearing to the court by said affidavit that the residence of said defendant is unknown to plaintiff and can not by reasonable diligence be ascertained, it is by the court ordered that service by publication be accordingly made as is provided by law, and the mailing of summons and copy of petition herein be dispensed with.

R. S. Sec. 5053.

No. 784.

Service by Publication Approved.

[*Caption.*]

Now comes the plaintiff by his attorney and offers proof of publication of the pendency and prayer of the petition

herein in the (*name paper*), a newspaper published and of general circulation in — county, Ohio, for — consecutive weeks on and after the — day of —, 18—, and the court finding the said publication and proof in all respects regular and according to law, and the former orders of this court, and that the clerk of this court, on the — day of —, 18—, did, as required by law, mail marked copies of said newspaper containing said notices, addressed, postage paid, to (*naming parties*), the court does therefore approve the same.

And the cause coming on to be heard now upon (*proceed with regular entry, as, for example, to quiet title, or whatever it may be*).

No. 785.

Service of Summons—Order setting aside.

[*Caption*].

This day this cause came on to be heard upon the motion of the defendant to set aside and quash the service of summons upon him in this action, and the court being fully advised in the premises, finds that said service of summons upon said defendant was irregular.

It is therefore ordered and adjudged that the said service and the sheriff's return thereof be and the same are hereby set aside and held for naught.

This entry may be used in all cases where motion is sustained to set aside service of summons and the sheriff's return thereof, as in cases where defendant is not within the jurisdiction of the court, where unauthorized constructive service has been made, where copy of summons has been left with wrong person, or at wrong place of residence, etc. See Kinkead's Code Pleading, Secs. 118, 119.

No. 786.

Service of Summons on Corporation authorized to be made where Officer, Agent or Director is a Nonresident—Under R. S. Sec. 5056a.

[*Caption*].

This cause came on to be heard on an application of plaintiff for an order authorizing C. K. to make service of summons on The C. K. Co. by delivering to C. K., the last known president of said company, a copy of said summons, and it being made to appear to the full satisfaction of the court that the defendant, The C. K. Co., is a corporation organized under the laws of the state of Ohio, owning real and personal property within the jurisdiction of this court; that

said defendant corporation is a proper party to this action, and that is there no officer, agent or director of said defendant corporation within the State of Ohio upon whom service of summons can be made in this action.

It is therefore ordered that W. B., a citizen of the state of —, city of —, be and he is hereby authorized to make service of summons on said defendant, The C. K. Co., by delivering a copy of a summons in this action upon the said C. K., the last known president of said company.

No. 787.

Entry ordering Case to be heard where part of Defendants are served.

[*Caption.*]

This day this cause came on to be heard upon the pleadings, the testimony, and was argued by counsel, and it having been made to appear to the court that the defendant A. B. is jointly indebted with the defendant C. D. on the contract set forth in the petition, that the said A. B. was not served with summons, and he has not otherwise entered his appearance herein, and that the court ordered this action to proceed against the said C. D.

It is therefore considered (*here proceed as in other cases*).

Sec. 5054, R. S.

No. 788.

Sheriff granted leave to Amend Return.

[*Caption.*]

It appearing to the court that the return of the sheriff of his service of summons on the defendant I. C. was inadvertently made and that service was not had upon said defendant I. C., she not having been found within this court, leave is hereby granted said sheriff to amend his said return accordingly.

RULES OF PLEADING— OF BOTH FORM AND SUBSTANCE— ENTRIES REQUIRING PLEADINGS TO CONFORM THERETO.

See MOTIONS.

Under this heading are found entries upon motions going to the form of statement. Under the head of "Motions" will be found other miscellaneous matters pertaining to motions.

No. 789.

Motion to separately state and number and to attach Notes.

[Caption.]

This cause came on to be heard upon the motion of the defendants herein to require the plaintiff to make his petition definite and certain, was argued by counsel and submitted to the court. Upon consideration whereof the said court finds that said motion is well taken and sustains the same; and it is thereupon ordered that the said plaintiff be required to make his petition definite and certain, first, by separately stating and numbering the several causes of action in his said petition set forth; second, by giving copies of the notes in said petition mentioned, with all credits and endorsements thereon.

And it is further ordered that time be given to said plaintiff to file an amended petition herein by —.

Kinkead's Code Pleading, Sec. 20; Whittaker's Civil Code, Sec. 5061 and notes.

No. 790.

Entry on Motion to separately state and number Amendment made at Bar.

[Caption.]

This day this cause came on for hearing upon the motion of defendant to require the plaintiff to separately number

her causes of action in the petition and amendment to the petition. In consideration thereof the court do sustain said motion, and by leave of the court the plaintiff is permitted to number the same on the margin of the petition instanter, which is accordingly done.

No. 791.

Entry on Motion to separately state and number Defenses in Answer, and to make Definite and Certain combined.

[*Caption.*]

This day this cause came on to be heard on motion of plaintiff, and motion of the defendants A. L. and W. H. P., filed herein, to the answer of the defendant M. E. D., to require said defendant to separately state and number defenses, and to make specific and definite, and to strike out, etc., and all matters in said motion contained, and was argued by counsel; on consideration whereof the court do sustain said motion. Thereupon, on motion of said defendant M. E. D., leave is granted to amend her answer in thirty (30) days after term, and this cause is continued.

No. 792.

Ordering substitution of Copies of Original Papers destroyed.

[*Caption.*]

It appearing to the court that the hereinafter-named original papers in this cause were destroyed by the recent burning of the Hamilton county courthouse, to wit: The amended answer, the entry sustaining demurrer to the petition, the entry overruling demurrer to amended petition, the entry sustaining demurrer to the first and third defenses of the amended answer, and the order of revivor, copies of all of which are presented herewith, it is ordered by the court that said copies of said original pleadings and entries be and the same are hereby substituted in the place and stead of said originals, and shall in all respects stand as said originals, and it is ordered by the court that said destroyed entries be restored by the clerk of this court on the journal.

From *Longworth v. Cincinnati*. Whittaker's Civ. Code, Sec. 5084 and notes. Lost papers. Kinkead's Code Plg., Secs. 64, 65, 70.

No. 793.

Substitution of Papers for those lost.

[*Caption.*]

It appearing to the court that the amended petition and the amended answer and counter-claim in this case have been lost, it is hereby ordered, on the application of the parties hereto, that they be allowed to substitute copies thereof. And that said copies be in all respects received instead of such original pleadings.

Whittaker's Civ. Code, Sec. 5084 and notes. Kinkead's Code Plg., Secs. 63-5.

No. 794.

Entry of filing Substituted Papers.

[*Caption.*]

Come now the parties, and the plaintiff now files a substituted petition herein, which petition is in the following words: [*here insert.*] And it is ordered that said substituted petition shall be taken and in all things stand for the original petition heretofore filed herein.

Whittaker's Civil Code, Sec. 5084 and notes.

No. 795.

Motion to strike out Irrelevant Matter in Answer.

[*Caption.*]

This cause coming on to be heard upon the motion to strike out from the answer of the defendant filed herein certain irrelevant matter, the court, upon consideration thereof, doth find said motion well taken and doth sustain the same, to which ruling and judgment of the court the defendant by his counsel excepts, and thereupon, upon motion of the defendant, leave is hereby given the defendant to file an amended answer herein by —.

Whittaker's Civ. Code, Sec. 5087 and notes. Kinkead's Code Pldg., Sec. 121.

No. 796.

Motion sustained in part and overruled in part—Entry sustaining motion to strike out interlineations made pending a demurrer.

[*Caption.*]

This day came the parties hereto, and thereupon this cause came on to be heard upon the motion filed by the defendant herein, and was argued by counsel and submitted to the court. Upon consideration thereof the court doth find that the said interlineation has been made since the demurrer filed by defendant to said original petition was overruled by this court, and the court doth sustain so much of said defendant's motion as asks the court to strike out of said amended petition said interlineations, and doth order the same to be stricken out of the petition.

And the court doth find the remaining branches of said motion not well taken and doth overrule the same.

Whittaker's Civ. Code, Sec. 5087 and notes.

No. 797.

Upon Motion to strike out—Granting same—Amendment filed—Leave granted to answer.

[*Caption.*]

This cause now came on to be heard on the defendant's motion to strike out certain portions of the plaintiff's petition. The said motion having been argued by counsel, the court, after due consideration, grants said motion in part and orders that that portion of the petition beginning on page 2, line 9th, with the words "and although by an ordinance," and continuing to and including the words "at such crossing," on page 3, line 4th, thereof, be and the same is hereby stricken from said petition. The court further orders that the words "in accordance with said ordinance of said city council," on lines 11 and 12, page 3, of said petition be also stricken from said petition. It is ordered that every word and allegation of said petition referring to the said ordinance of the council of the city of — be and they are hereby stricken from said petition; and thereupon the plaintiff forthwith appeared and made the amendments in said petition according to the order aforesaid, by striking out and interlining the same. It is further ordered that defendant

have to answer said petition within thirty days from date without prejudice to the trial of said case at this term of the court.

Jacob Langendorf v. Pennsylvania Co., S. C. Whittaker's Civil Code, Sec. 5087 and notes.

No. 798.

Upon Motion to strike from Files.

[*Caption.*]

This day this cause came on for hearing upon the motion of defendant to strike the petition from the files for reasons set forth in said motion; and the court being fully advised in the premises do sustain said motion, and leave is granted plaintiff to amend his petition in — days, and cause continued.

Kinthead's Code Pleading, Sec. 122.

No. 799.

Order that Pleading be made definite and certain.

[*Caption.*]

This day came the parties, and the court being fully advised herein, sustains the motion of the defendant to make the petition definite and certain.

It is ordered that within — days from this date the plaintiff amend his petition by [*here state in what respect; see last Form*].

[That in default of such amendment being so made the petition be stricken out.]

[Meanwhile it is ordered that all further proceedings by the plaintiff be stayed.]

[That the time for the defendant to answer, demur, or take any other action to which he may be entitled, is extended until the expiration of — days after such amended petition shall have been filed.]

NOTE.—Whittaker's Civil Code, Sec. 5088 and notes; Kinthead's Code Plg., Sec. 123, and Hughes v. Chicago, etc., Ry. Co., 45 N. Y. Super. Ct. 114.

No. 800.**Withdrawal of Counter-claim or Set-off.**

[*Caption.*]

This day came A. B., defendant herein, and filed his motion herein, asking leave to withdraw the counter-claim [*or, set-off*] set forth in his answer herein, and to have the same placed upon the dockets of this court that proceedings may be had therein in this court against the said C. D., without further process. Upon consideration whereof the court grants said motion, said defendant is hereby granted leave to withdraw his said counter-claim, and the clerk of this court is directed to place the same upon the dockets of this court as a new action, and the said defendant A. B. is allowed to proceed therein as a new action against the plaintiff C. D., without the issuance of further process.

Whittaker's Civil Code, Sec. 5089; Bryant v. Swetland, 48 O. S. 194, 208.

No. 801.**Motion stricken out from Files—Filed out of rule.**

[*Caption.*]

It is ordered by the court that the motion heretofore filed herein by the defendant herein on the —— day of ——, 18——, be and the same is hereby stricken from the files for the reason that the same was filed out of rule.

Whittaker's Civil Code, Sec. 5097.

No. 802.**Motion to strike from files for want of verification.**

[*Caption.*]

This day this cause came on to be heard upon the motion of defendant herein to strike the petition herein from the files for want of proper verification, and the court finding said motion to be well taken does sustain the same. And thereupon, upon motion of plaintiff, leave is granted said plaintiff to make a proper verification of said petition at bar.

Whittaker's Civ. Code, Sec. 5102 and notes.

No. 803.

Entry sustaining Demurrer to Petition—Granting leave to amend.

[*Caption.*]

This cause came on to be heard upon the demurrer of the defendant to the petition of the plaintiff and was argued by counsel; on consideration whereof the court sustained said demurrer, to which ruling of the court said plaintiff excepts, and thereupon leave is granted to the plaintiff to file an amended petition herein in thirty days from —, 18—.

NOTE.—This entry is not a final order; if it be desired to have it made a final order the petition should be dismissed. Overruling a demurrer, without further order made, is not a final order. See Kinkead's Code Plg., Sec. 93, 106.

No. 804.

Entry overruling Demurrer to Petition—Granting leave to defendants to answer.

[*Caption.*]

This cause now coming on for hearing upon the demurrer to the petition filed herein by the defendants, and in consideration thereof the court do overrule said demurrer, to which ruling of the court the defendants, by their counsel, did at the time except; and thereupon leave is given defendants to answer to the amendment of the petition in — days and cause continued.

NOTE.—Order overruling demurrer to petition without further order not final. Kinkead's Code Plg., Sec. 93.

No. 805.

Entry sustaining Demurrer and dismissing Action.

[*Caption.*]

This cause came on to be heard by the court upon the demurrer of the defendant to the amended petition of the plaintiff and was argued by counsel; on consideration whereof the court sustained said demurrer, to which ruling of the court the plaintiff excepts, and thereupon the plaintiff not desiring to plead further, the court dismissed this cause at the costs of the plaintiff, to which order and judgment of the court the plaintiff excepts. It is therefore considered that

the defendant recover of the plaintiff his costs in this action expended, taxed at \$——, and that the plaintiff pay her own costs, and in default of the payment thereof that execution issue therefor, to all of which rulings, judgment, and order the plaintiff excepts.

No. 806.

Answers to Interrogatories enforced by Default Judgment.

[*Caption.*]

This day came A. B., plaintiff herein, and represented that the said defendant had failed to answer the interrogatories attached to plaintiff's petition and moved the court for judgment by default. The court, upon consideration thereof, orders that the said defendant answer said interrogatories on or before ——, 18——, and that in default thereof judgment be taken against him by default as allowed by law.

This will not enforce itself, but another entry must be made. 48 O. S. 681.

No. 807.

Entry of Default Judgment upon Failure to Answer.

[*Caption.*]

This day came the plaintiff, A. B., and representing to the court that the defendant has failed to comply with the order heretofore made herein, requiring him to answer the interrogatories attached to plaintiff's petition, and the court being satisfied that said defendant has failed to comply with said order, and has failed and neglected to answer said plaintiff's interrogatories, and upon motion this cause came on to be heard further upon the petition of plaintiff, and the said defendant being in default for answer to the said interrogatories, the court does find in favor of plaintiff, etc. [*Proceed.*]

AMENDMENT OF PLEADINGS.

No. 808.

Nunc pro tunc Entry ordering amended Answer, Demurrer and Reply, and Entry overruling Demurrer to amended, to be filed by leave, as of —, 18—.

[*Caption.*]

This cause having come on to be heard upon the — day of —, 18—, and the defendant having made application to the court to file an amended answer by adding a second defense to the answer already on file, and having submitted to the court and counsel of plaintiff a copy of said second defense, without verification, it was agreed by both plaintiff and defendant that said cause should proceed as if said amended answer had been verified and filed, and that said answer might be amended and filed after the trial of said cause.

And thereupon plaintiff made application to file a demurrer to said second defense on the ground that it did not state facts sufficient to constitute a cause of action, and it was agreed by both plaintiff and defendant that said demurrer should be considered as filed, and that plaintiff could actually file the same after the trial.

And the court having overruled said demurrer, plaintiff made application to the court for leave to file a reply denying the allegations of said second defense, and it was agreed by plaintiff and defendant that said cause should proceed as if said reply had been verified and filed, and that plaintiff should be permitted after the trial to verify and file the same.

And the parties herein now presenting to the court an amended answer duly verified, a demurrer to the second defense of said amended answer, an entry overruling said demurrer, and a reply to said amended answer, duly verified, it is hereby ordered by and with the consent of both parties herein, that the same be, and they are hereby ordered to be filed as of the — day of —, A. D., 18—.

From Cincinnati Times-Star Co. v. Kahn, Hamilton Co.

No. 809.**Order amending Summons.**

[*Caption.*]

This cause coming on for hearing upon the motion of plaintiff herein for an order amending the summons [*or whatever it may be, R. S. Sec. 5114*] herein, the court, upon careful consideration thereof, doth sustain said motion, and orders that said summons be and the same is hereby amended by striking therefrom the name of A. B. as defendant herein, without prejudice to the proceedings [*or, by striking from the summons the words "John Jones" used therein to designate a party defendant herein, and inserting in lieu thereof the correct name of said party, to wit, George Jones, without prejudice to the proceedings already had, and that all subsequent proceedings be taken under said correct name.*]

Whittaker's Civil Code, Sec. 5114 and notes.

No. 810.**Amendment to conform Pleadings to Proof—Refused.**

[*Caption.*]

Defendant H. S., administrator, and A. B. L., guardian, moved the court, after the argument was concluded and before the jury was charged, for leave to file an amendment to their pleadings, respectively, by stating therein the various amounts advanced by the plaintiffs on account of the purchase and payment of premiums on said policy, and all other expenses incident thereto, and praying the court that if judgment is rendered in favor of either of them, that the court find as to said amount, and decree to the plaintiffs out of said judgment said sums so advanced.

Which motion the court overrules, to which the said defendants except.

Kinthead's Code Pleading, p. 123.

No. 811.**Amendment to Cure Material Variance.**

[*Caption.*]

This cause coming on this day to be further heard upon the pleading and evidence before the court and jury, and the

defendant having raised the objection that there is a variance between the allegations of plaintiff's petition and the proof adduced prejudicial to said defendant. and the court upon consideration thereof finds that there is a material variance between allegation and proof which is prejudicial to the defendant, it is therefore ordered that said cause be continued at the costs of plaintiff; and the plaintiff is hereby granted leave to amend his petition by —.

Whittaker's Civil Code, 5294 and notes.

No. 812.

Upon motion in open court to strike out to conform Petition to Testimony.

[*Caption.*]

Upon motion of plaintiff in open court to conform petition to the testimony, it is ordered that said motion be granted, and that the words — and —, where they occur in the petition, be and the same are hereby stricken out of said petition, to all of which the defendant excepts.

No. 813.

Amendment to conform to Proof allowed.

[*Caption.*]

It is ordered that the plaintiff have leave to amend his petition so as to conform with the proofs or case as made by the plaintiff upon trial; and that the petition be filed and included in this case, which is accordingly done.

MOTIONS.

See RULES OF PLEADING.

No. 814.

Motion overruled—Grounds waived by not including same in former Motion.

[*Caption*].

This day the motion of the defendant, filed —, 18—, came on to be heard, and the court, having heard the arguments of counsel and being fully advised in the premises, finds that said motion is not well taken; that the defendant has heretofore filed a motion herein to the petition in this cause on the — day of —, 18—, and did not include therein the grounds now contained in the motion now upon hearing, and that said defendant thereby waived his right to make the motion herein by the filing of said former motion to the petition by failing to include therein the matter in this motion, and the court overrules the same. Leave is given the defendant to answer, etc.

No. 815.

Entry upon motion—Motion to answer—Sustaining it—Granting leave to withdraw Pleadings and file Amended Pleadings.

[*Caption*].

This cause came on to be heard upon the motion of plaintiffs to the amended answer and cross petition of E. S. and was argued by counsel, whereupon the court finds the said motion to be well taken. It is therefore considered that the said motion be and the same is hereby sustained, and said E. S. is, on her motion, granted leave to withdraw from the files her original and amended answer heretofore filed herein and to file amended pleadings in fifteen days from this date. To which ruling of the court defendant excepts.

No. 816.

Entry on Motion to set aside Judgment rendered against Minors.

[Caption.]

This day this cause came on to be heard on motion to set aside the order and judgment herein rendered at the last term of this court. And it appearing to the court that said order and judgment was irregularly taken in this, to wit: That one of said defendants was a minor under the age of majority, and not served with process in this action, and not represented by guardian, nor by guardian *ad litem*, the said judgment is therefore hereby vacated, set aside and held for naught.

No. 817.

On Motion to set aside former Entry.

[Caption.]

This day the cause came on to be heard by the court, on the motion of the plaintiff to set aside the order and journal entry made in this case on the — day of —, 18—, and the court having been fully advised in the premises, it is ordered by the court that said order and journal entry be set aside, and that said cause be reinstated on the docket and the question of costs is assessed.

No. 818.

Upon Motion to set aside Judgment for Costs.

[Caption.]

And this cause now coming on for hearing upon the motion of the defendant to set aside the judgment for costs heretofore rendered herein, the same was argued by counsel and submitted to the court. On consideration whereof the court, being fully advised in the premises, sustained said motion. It is therefore considered by the court that the judgment for costs heretofore rendered herein against the said defendant be and the same is hereby vacated and set aside, to which ruling and judgment of the court in sustaining said motion and setting aside said judgment for costs the plaintiff by counsel excepts.

No. 819.

Upon Motion to withdraw ground of Motion — and upon Motion to separately state and number.

[*Caption.*]

On motion leave is given to the plaintiff to withdraw the second ground of his motion herein, and the same is withdrawn, and this cause now coming on for hearing on motion of the plaintiff to require the defendant to separately state and number the defenses set forth in his answer herein, the same was argued by counsel and submitted to the court. On consideration whereof the court being fully advised in the premises overruled said motion, to which ruling of the court the plaintiff by counsel excepts.

No. 820.

Upon Motion to Strike Depositions from Files.

[*Caption.*]

This cause coming on for hearing upon the plaintiff's motion to strike from the files the depositions heretofore filed on behalf of the defendant, the plaintiff, on her own motion, is allowed so to amend the affidavit of service of notice for taking said deposition as to "20th" for "21st" in the date of taking said deposition. Thereupon said motion is sustained by the court; to which the defendant excepts.

No. 821.

Consolidation of Actions.

[*Caption.*]

On motion of defendant M. S., it is by the court ordered that cause number —, entitled M. S., plaintiff, v. F. J., defendant, be and the same is hereby consolidated with the above-entitled cause, and that they be heard and considered together.

R. S. Sec. 5120. This is usually made on motion.

TIME OF TRIAL—CONTINUANCE.

(*R. S. Secs. 5132—5136.*)

No. 822.

Order on filing Affidavit for a Continuance.

[*Caption.*]

Now come the parties, and the defendant now moves the court for a continuance of the cause until the next term of this court [*or, until the — day of —, 18—*], and in support thereof files and submits his own affidavit.* Wherefore the plaintiff admits that the witness H. I., named in said affidavit, would, if present, testify to the facts stated in said affidavit as true [*or, in case of absent documentary evidence, or evidence in a criminal cause, consents that the evidence set out in said affidavit shall be taken as true*].

And the court, because of said admission, now overrules said motion for a continuance [to which the defendant excepts].

[*Or, after**: And the plaintiff refusing to admit that said witness H. I., named in said affidavit would, if present, testify to the facts stated in said affidavit as true [*or, refusing to consent that the evidence in said affidavit shall be taken as true, in case of absent documentary evidence, or in a criminal case,*] the court now sustains said motion, to which the plaintiff now excepts.

It is therefore ordered that this cause be continued until the next term of this court [*or, until the — day of —, 18—*], (at the costs of the defendant.)).

Whittaker's Civil Code, Secs. 5132–5136 and notes.

No. 823.

Cause Postponed for Future Assignment.

[*Caption.*]

This day this cause coming on to be heard upon the assignment thereof, the same is postponed for future assignment upon the application of A. F. at this term of court.

No. 824.**Ordinary Entry of Continuance.**

[*Caption.*]

This day this cause came on to be heard by the court, on motion of the plaintiff for a continuance, and the court having been fully advised in the premises, said motion is granted, and cause continued to next term of this court. The costs of this term to be taxed to the plaintiff. It is therefore considered that said defendants recover of said plaintiff their costs of this action for the term taxed by the clerk at \$——.

TENDER AND OFFER.

(*R. S. Secs. 5137—5143.*)

No. 825.**Tender of money before suit, R. S. Sec. 5137.**

[*Caption.*]

This cause came on to be heard upon the pleadings, the evidence, and was argued by counsel to the court, the parties, by consent, having waived trial by jury, and being fully advised in the premises, the court finds that the defendant, as set forth in his answer, did tender plaintiff * the sum of \$—— on said contract, before the commencement of this action, and that said defendant paid to the clerk of this court, before trial herein, the sum thus tendered.

It is therefore considered by the court that said plaintiff recover of said defendant the sum of \$——, and that said clerk out of the money in his hands pay first the costs of this action taxed at \$——, and the remainder of said sum to plaintiff in satisfaction of his said judgment

Whittaker's Civil Code, Sec. 5137 and notes.

No. 825 $\frac{1}{2}$.

Tender of performance of labor and service.

[*Proceed as in No. 825 to *, then state:*]

. . . said labor and service on said contract, and that said labor and service was of the value of \$——.

It is therefore considered by the court that plaintiff recover from the defendant the said sum of \$—— without interest or cost.

Whittaker's Civil Code, Sec. 5138 and note.

No. 826.

Entry Allowing Defendant to Perform Contract after Tender Proved—Under R. S. Sec. 5138.

[*Caption.*]

This cause came on to be heard on the petition of plaintiff, the answer thereto—a jury having been waived—and the court being fully advised in the premises finds that on the —— day of —— 18——, defendant did, as alleged in his answer, tender full performance of said contract, and that defendant is now ready and willing to perform the same forthwith, it is therefore considered by the court that if said defendant delivers said articles of personal property [*or, performs said labor*] within —— days, he go hence without day and recover from the plaintiff his costs.

Whittaker's Civil Code, Sec. 5138 and note.

No. 827.

Tender of Article or Thing other than Money—R. S. Sec. 5138.

[*Caption.*]

[*Proceed as in No. 825 to *, then state*] said articles of personal property on said contract at the time and place therein agreed upon, and that said articles of personal property are of the value of \$——.

It is therefore considered by the court that plaintiff recover from the said defendant the sum of said \$——, without interest or costs.

Whittaker's Civil Code, Sec. 5138 and note.

No. 828.**Tender—Offer to Confess Judgment before Action—Under
R. S. Sec. 5139.**

[*Caption.*]

This day this cause came on to be heard upon the pleadings and testimony, and a jury having been waived by the consent of the parties hereto, and the court being fully advised, finds that, prior to the bringing of this action, the defendant duly notified plaintiff that on the — day of —, 18—, he would appear in the Court of Common Pleas of — county, Ohio, and offer to confess judgment in favor of plaintiff for the sum of \$ — ; that said plaintiff appeared at said time and place [*or, failed to appear, as the case may be*], and refused to accept said confession of judgment.

It is therefore considered that plaintiff recover of said defendant said sum of \$ —, without interest or costs.

No. 829.**Tender—Offer to confess out of Court, under R. S. Sec. 5140.**

[*Caption.*]

This cause came on to be heard upon the pleadings, the testimony and argument of counsel, a jury having been waived by consent of parties, the court finds, that the defendant served, in writing, an offer to allow judgment to be taken against him, and in favor of plaintiff in the sum of \$ — ; that said plaintiff did not, within five days thereafter, notify defendant or his attorney, an acceptance of said offer to confess judgment in said sum.

It is therefore considered by the court that plaintiff recover from defendant said sum of \$ — without interest or costs.

No. 830.**Tender and offer to confess in Open Court under
R. S. Sec. 5141.**

[*Caption.*]

This cause came on to be heard upon the pleadings, the testimony and argument of counsel, a jury, by consent of parties, having been waived, and the court being

fully advised in the premises, finds that on the — day of —, 18—, defendant in open court offered to confess judgment in this action for the sum of \$—, in favor of plaintiff, which the said plaintiff refused to accept, and that there is due plaintiff from the defendant the sum of \$—.

It is therefore considered that plaintiff recover from the defendant the sum of \$—, and the same being less than the amount for which defendant offered to confess judgment, it is further considered that defendant recover from plaintiff the costs of this action made since —, the time of said offer to confess judgment, taxed at \$—.

No. 831.

Tender—Offer and Acceptance under R. S. Sec. 5141.

[*Caption.*]

This day came the parties herein, and it appearing to the court that on the — day of —, 18—, the defendant served an offer in writing upon plaintiff, to confess judgment in favor of said plaintiff in the sum of \$—; that plaintiff accepted said offer to confess judgment as aforesaid, giving notice thereof to defendant within five days after service of said offer. It is therefore considered that the plaintiff, J. D., recover from the defendant, J. D. B., said sum of \$—, and his costs herein expended, taxed at \$—.

No. 832.

Verdict of Jury after tender proved under R. S. Sec. 5138.

[*Caption.*]

This day came the parties herein by their attorneys, also came the following-named persons as jurors, to wit: [*naming them*], regular jurors to this term, who were duly impaneled and sworn according to law, and thereupon the case came on for hearing on the pleadings and the evidence. And said jury having heard the testimony, the argument of counsel and charge of the court, retired to their room in charge of the sheriff for deliberation.

And now comes said jury into open court with their verdict in writing, signed by their foreman, and say:*

We, the jury, being duly impaneled and sworn, find that the defendant did, on the — day of —, 18—, tender

plaintiff payment on said contract the sum of \$——, and that before the trial of this action pay to the clerk of this court the said sum of \$——, and we assess the amount due plaintiff, J. D., from defendant, J. W., the sum of \$——.

JUDGMENT ON ABOVE VERDICT.

The jury in this action having at a former day of this term returned a verdict in favor of plaintiff, J. D., and against the defendant, J. W., in the sum of \$——, said sum being no more than the amount tendered plaintiff by defendant and paid into court and no motion for a new trial having been filed herein [*or*, the motion for new trial having been overruled], it is therefore considered by the court that the clerk, out of the money in his hands, pay the costs in this action taxed at \$——, and the remainder of said sum, amounting to \$——, to plaintiff, J. D.

Whittaker's Civil Code, Sec. 5137 and notes.

No. 833.

Verdict of Jury after tender of Chattels or performance of Labor under R. S. Sec. 5138.

[*Caption.*]

[*Proceed as in above No. 832 to *, then state as follows:.*]

We, the jury, being duly empaneled and sworn, find that the defendant did tender plaintiff said articles of personal property [*or*, such work and labor, as the case may be] on said contract at the time and place therein agreed upon, and we do assess the value of said personal property [*or*, such labor and material, as the case may be, at \$——] at \$——. We do further find that there is due plaintiff, C. D., from the defendant, F. W. L., the sum of \$——.

[*Judgment on above verdict will be as follows:.*]

The jury in this action having at a former day of this term returned a verdict in favor of plaintiff and against defendant in the sum of \$——, finding in their verdict that the assessed value of the property [*or*, labor and work, as the case may be], was \$——, and no motion for new trial having been filed [*or*, the motion for new trial filed herein having been overruled, as the case may be], it is therefore considered by the court that plaintiff, C. D., recover from the defendant, F. W. L., the sum of \$—— without interest or costs.

Whittaker's Civil Code, Sec. 5138 and notes.

No. 834.

Verdict of Jury after offer to confess Judgment in open Court.

[Caption.]

[Proceed as in above No. 832 to *, then state as follows:]

We, the jury, being duly impaneled and sworn, find that prior to the bringing of this action the defendant duly notified plaintiff that on the — day of —, 18—, he would appear in the court of common pleas of — county, Ohio, and offer to confess judgment in favor of plaintiff for the sum of \$—; that said plaintiff appeared at said time and place [*or, failed to appear, as the case may be*], and refused to accept said confession of judgment, and that there is due plaintiff from said defendant the sum of \$—.

[Judgment on the above verdict will be as follows:]

The jury in this action having at a former day of this term returned a verdict in favor of plaintiff and against the defendant in the sum of \$—, finding in their verdict that the defendant had offered to confess judgment in open court for a sum more than the amount so found due, and no motion for a new trial having been filed [*or, the motion filed herein for a new trial having been overruled, as the case may be*], it is therefore considered by the court that plaintiff recover from said defendant said sum of \$— without interest or costs.

No. 835.

Verdict finding for a Sum less than Amount Tendered.

[Caption.]

[Proceed as in above No. 832 to *, then state as follows:]

We, the jury, being duly impaneled and sworn, find that the defendant did not tender to plaintiff the payment of \$— on the contract set up in the petition, and we do assess the damages of plaintiff at \$—.

[Judgment on the above verdict will be:]

The jury in this action having at a former day of this term returned a verdict in favor of plaintiff and against the defendant in the sum of \$—, and no motion for a new trial having been filed [*or, the motion for a new trial having been overruled, as the case may be*] it is therefore considered by the court that plaintiff recover from the defendant the sum of \$—, and his costs herein expended, taxed at \$—.

This form may be used in all cases where the verdict of the jury is for a less sum than was tendered or where there is a verdict that no tender was made.

No. 836.

Entry tendering Amount—And of Payment of Amount admitted due into Court—Discharging Defendant from Liability.

[*Caption.*]

Comes now the N. Y. L. I. Co. in open court, by F. & F., its attorneys, and in obedience to the order heretofore made herein, requiring said company to deposit in this court the sum of \$——, admitted by said company to be due on a policy of life insurance, issued by it ——, 18—, on the life of W. H. L., now deceased, numbered ——, the sum to remain in the custody of this court to abide the further order of the court; the said company does now deposit said sum of \$—— in the court, and the said company is now forever discharged from all liability on said policy to the plaintiffs herein, to wit, L. F. C. and W. B. W., administrator of the estate of H. L. M., deceased, and to the defendants herein, to wit, H. S., administrator of the estate of W. B. L.; A. B. L., as guardian of W. B. L. and P. S. L., and J. L., and to each of them, and the said N. Y. L. I. Co. is now given judgment herein for its costs, and this cause is continued as to the said plaintiffs and defendants.

It is further ordered that said policy be canceled by the clerk of this court, and held for use in evidence in this cause, and on the final disposition of this cause said policy shall be delivered to the said N. Y. L. I. Co.

Sabin v. Corcoran, S. C., Greene Co.

 No. 837.

Entry in Appeal Case—Costs—Entry finding Costs where tender is made before Justice of the Peace and amount recovered not equal to the amount recovered.

[*Caption.*]

This cause coming on this day for hearing, a jury having been expressly waived by each of the parties, was submitted to the court upon the petition, answer, and the evidence, and upon due consideration thereof the court finds that there is due, owing and unpaid, the said plaintiff from the said defendant the sum of \$——, but the court finds further that before this cause was tried in the court of the Justice of the Peace, from which appeal was taken to this court, the said defendant offered in writing to pay the said plaintiff in full

of his said claims the sum of \$——, in accordance with the provisions of the statute therefor provided, which offer the said plaintiff refused to accept and the aforesaid cause was tried.

It is therefore considered by the court that the defendant recover from plaintiff the said sum of \$——, that he recover from plaintiff his costs expended in said case before said Justice taxed at \$——, and his costs herein expended, taxed at \$——, for all of which execution is awarded.

REVIVOR OF ACTIONS.

No. 838.

Entry of Abatement of Action.

[*Caption.*]

It having been made satisfactorily to appear to the court that the plaintiff in this action has deceased since the commencement thereof, and that it is not such an action as survives the death of either party, it is [*or*, upon motion of defendant] ordered that said action be dismissed.

R. S. Sec. 5144. Actions for slander, malicious prosecution, nuisance, or one against a Justice of the Peace for misconduct in office, abate.

No. 839.

Order of Revivor of Action in Name of Personal Representative by Consent.

[*Caption.*]

It appearing to the court that since the filing of the petition in this cause the said J. L., one of the plaintiffs herein, has departed this life, and that N. L., L. A. and J. D. have been duly appointed and qualified by the Probate Court of ——— county as executors of the last will and testament of J. L., and all parties hereto consenting, and this action being one which survives the death of either party, it is hereby, on motion of T. McD., Esq., ordered that this action do stand revived in the names of said N. L., L. A. and J. D., as executors as aforesaid, and do proceed in their favor.

Whittaker's Civil Code, Sec. 5148 and notes; Kinkead's Code Pleading, Secs. 1107-1111.

No. 840.

Entry of Revivor in Name of Successor.

[*Caption.*]

It appearing to the court that G. W. Y., assignee of C. & S., insolvent debtors, has departed this life since the commencement of this action, and that T. C. R. has been appointed his successor in said trust, it is hereby ordered that this cause stand revived in the name of said T. C. R., trustee, in trust of C. & S., and that the same proceed in his favor.

Greer v. Howard, 41 O. S. 591.

No. 841.

Entry of Revivor in Name of Successor (Defendant) when Administrator is Removed or Resigned.

[*Caption.*]

It appearing to the court that A. D., administrator of the estate of C. D., deceased, defendant herein, has been removed [*or, resigned*] as such administrator, and that C. S. W. has been appointed administrator *de bonis non* of such estate, it is therefore upon motion of plaintiff ordered that this cause stand revived in the name of said C. S. W., as administrator *de bonis non* of the estate C. D., deceased, and that the same proceed against said C. S. W. as such administrator.

R. S. Sec. 5148; *In re* Estate of A. N. Dunham.

No. 842.

Conditional Order of Revival.

[*Caption.*]

This day came the plaintiff by M. & B., his attorneys, and suggest to the court that F. V. has died since the commencement of this action, and the court being satisfied thereof, upon motion of plaintiff orders that unless the parties therein shall within — days after service of a copy of this order show some cause why this action should not be revived, that said cause shall stand revived in the name of V. L., the only child and heir at law of said F. V., deceased.

Whittaker's Civil Code, Sec. 5149 and notes.

The conditional order may be made upon motion of the adverse party, or of the representative. R. S. Sec. 5151.

A certified copy of this entry should be served by the sheriff as other process. R. S. Sec. 5152. See Kinkead's Code Pleading, Secs. 1107-1111.

The order is served in the same manner as a summons, and the time within which the parties must show cause against revivor should be within a reasonable time after the return of the order, which is the second Monday after the Saturday of the week the order is issued. R. S. Secs. 5152, 5039.

No. 843.

Ordering service by Publication of conditional order of Revivor.

[*Caption.*]

This day came the plaintiff [*or*, A. B., administrator of C. D., deceased,] and filed herein his affidavit, alleging that E. F., one of the defendants herein, has died since the commencement of this action, and that G. H. and I. J. are his legal representatives; that said G. H. and I. J. are non-residents of the state [*or*, have left the state to avoid the service of the order, etc. R. S. Sec. 5153]. Upon motion of said plaintiff it is ordered that he cause a notice to be published according to law, notifying said G. H. and I. J. to appear on the — day of —, 18—, and show cause why the action should not be revived against them, and that unless they show sufficient cause to the contrary the action shall stand revived.

Whittaker's Civil Code, Sec. 5153.

No. 844.

Entry Reviving cause in name of Administrator upon service of conditional order.

[*Caption.*]

Now comes the said A. B. D., and it appearing to the court that the conditional order of revivor hereinbefore made has been duly served upon the said C. S., and no cause being shown against said revivor, it is hereby ordered that this action stand revived in the name of W. H. D., and that it proceed against him.

No. 845.**Entry of Filing supplemental Pleading for Revivor of Action by Plaintiff.**

[*Caption.*]

This day came A. B., administrator of the estate of C. D., deceased, and by leave of court forthwith filed herein a supplemental pleading, alleging that C. D., plaintiff herein, has died since the commencement of this action, and it appearing that this action is one which survives to the personal representative of the plaintiff, it is ordered that the same stand revived in the name of said A. B., as administrator of the said C. D., deceased, and that the same proceed in his favor.

R. S. Sec. 5149.

No. 846.**Entry of Filing of supplemental Pleading by Plaintiff for Revivor of Action against Heirs—Conditional order of Revivor.**

[*Caption.*]

This day came the plaintiff herein, and upon leave of court filed a supplemental pleading herein, alleging that C. D., the defendant herein, has died since the commencement of this action, and that he died leaving the following heirs, to wit : [*names.*]

It is therefore ordered that unless said parties, heirs aforesaid of C. D., deceased, shall, within — days after this order has been served upon them, appear and show cause why this action shall not stand revived against them, that the same shall so stand revived against them.

R. S. Secs. 5149, 5155, 5156.

No. 847.**Entry of Dismissal of Action when not Revived against Defendant.**

[*Caption.*]

It appearing to the court, from the affidavit of —, that C. D., defendant herein, has been dead for a period so long that the action can not be revived in the name of his representative unless the parties consent hereto, and said parties

not having consented to a revivor of said cause the same is hereby ordered to be stricken from the docket.

R. S. Sec. 5159.

No. 848.

Entry of Dismissal when Plaintiff Dies and Action is not Revived.

[*Caption.*]

This day this cause came on to be heard upon the application of the defendant to have this cause dismissed, and it appearing to the court that A. B., plaintiff herein, died on the — day of —, 18—, at a former term of this court, and that this action has not been revived in the name of the personal representative, and that due notice has been given to plaintiff's representatives of this application, it is ordered that said cause be stricken from the docket and that defendant recover his costs herein expended from the estate of said A. B., deceased.

R. S. Sec. 5160.

COSTS.

No. 849.

Motion for Security for Costs.

[*Caption.*]

This day this cause came on to be heard on the motion of the defendant to require the plaintiff to give security for costs on the ground that said plaintiff is a non-resident of this county; and upon consideration thereof the court finds said motion to be well taken and therefore sustains the same. It is ordered that said plaintiff give security for costs to the satisfaction of the clerk of this court within — days from the date of this entry.

No. 850.**Order for additional Security for Costs.**

[*Caption.*]

Come now the parties, and it appearing to the court by the affidavit of C. D. that the security heretofore given by the plaintiff for costs is insufficient, it is ordered that he give an additional undertaking for costs, with sufficient security, on or before the — day of the present term of this court.

No. 851.**Order of Dismissal for failure to give Security for Costs.**

[*Caption.*]

Come now the parties, and the plaintiff having failed [*or, refused*] to give a bond to secure the costs herein as heretofore ordered by the court, it is ordered that this cause be dismissed at his costs.

[*Judgment for costs.*]

NOTE.—Sec. 8580.

No. 852.**Entry upon Motion to Retax Costs.**

[*Caption.*]

This cause coming on to be heard upon the motion to retax the costs herein, and the court having heard the evidence, orders that the clerk retax the costs in this case, charging to the plaintiff the cost of the witnesses R. N., R. M., V. X., V. W., W. V., B. A., D. C. and F. E., and also the costs of filing the answer to the second paragraph of the petition, the reply to said answer, and the order-book entries with reference to said answer and reply, and that execution issue accordingly.

APPOINTMENT OF STENOGRAPHER.

No. 853.**Appointment of Stenographer.**[*Caption.*]

This day, upon application of the plaintiff, it is ordered by the court that upon said plaintiff's entering into a bond to the satisfaction of the clerk of this court, A. C., one of the official stenographers of this court, be and he is hereby appointed to report the testimony in this case, and the same is accordingly so done; and it is further ordered that the *per diem* fee of the stenographer aforesaid be taxed in with the costs in this case as part thereof.

No. 854.**Appointment of Stenographer—Another Form.**[*Caption.*]

Upon application of the defendant the services of J. F. J., an official stenographer, are granted upon condition that satisfactory security be given for the *per diem* fees of said stenographer, and R. B. S. being offered as security the court approves the same.

TRIAL BY JURY—FORMAL ENTRIES.

NOTE.—Most of the entries under this heading are mere formal ones which are prepared by the clerk.

No. 855.

Entry ordering second Petit Jury.

[*Caption.*]

The court deeming it necessary to have two petit jurors [*or*, to have a new petit jury; *or*, to have members to fill up the regular panel], it is therefore ordered that — jurors be drawn from the box, and that a venire therefor forthwith issue, requiring them to appear on the — day of —, 18—.

R. S. Sec. 5172.

No. 856.

Entry ordering Venire for Talesmen.

[*Caption.*]

The regular panel of the jury not being full, upon motion of — the following names are selected by the court as talesmen [*names*], and it is ordered that a venire issue for such persons to appear forthwith [*or*, such time as court may require].

R. S. Sec. 5173.

No. 857.

Entry of Impaneling Jury—Partial Hearing and Continuance.

[*Caption.*]

This day came the parties herein, by their attorneys, also came the following-named persons as jurors, to wit: —, who were duly impaneled and sworn according to law; and thereupon this case came on for hearing on the pleadings and evidence, and said jury having heard the testimony adduced, in part, were duly cautioned and discharged until the coming in of court tomorrow morning.

No. 858.

Order to Jury to View Premises.

[Caption.]

On motion to the court by counsel for the plaintiffs, it is ordered that the jury be conducted in a body in charge of the sheriff to view the premises in controversy herein, and that the same be shown to them by W. M. K., for plaintiffs, and J. C., for defendant, and that they return at 2:30 o'clock p. m., —, 18—.

No. 859.

Entry impaneling Jury—Ordering a View at once.

[Caption.]

This cause being at issue, thereupon came a jury, to wit: [*naming them*], good and lawful men of said county, who being duly impaneled and sworn, thereupon on motion to the court it is ordered that the jury be conducted in a body, in charge of the sheriff, to view the premises in controversy herein, and that the same be shown them by J. M., and afterwards, on the same day, said jury returned into court and said cause proceeded to trial with the evidence and arguments of counsel, and not being concluded, the court adjourned the further trial of this case until the coming in of court on tomorrow morning, till which time said jury is excused under instruction of the court.

No. 860.

Partial daily hearing to Jury.

[Caption.]

This day again came the said parties, by their attorneys, also came the jury heretofore impaneled and sworn, and the trial proceeded, and the said jury having heard additional testimony were duly cautioned and discharged until the coming in of court tomorrow morning.

No. 861.**Entry of close of Hearing—Argument—Charge and return of Verdict.***[Caption.]*

This day again came the said parties, by their attorneys, also came the jury heretofore impaneled and sworn, and the said jury having heard the remaining part of the argument and charge of the court, retired to their room in charge of the sheriff for deliberation.

And now comes said jury into open court with their verdict in writing, signed by their foreman, and say: "We, the jury, being duly impaneled and sworn and affirmed, find the issues in this case in favor of the plaintiffs, and assess the amount due to the plaintiffs from the defendant, J. B. Y., at the sum of \$——."

J. H., Foreman.

Thereupon defendant, J. B. Y., by his counsel, gave notice of a motion for a new trial.

No. 862.**Entry of Hearing of Remainder of Case and ordering Sealed Verdict to be returned.***[Caption.]*

This day again came the said parties, by their attorneys, and also came the jury heretofore impaneled and sworn, and the trial proceeded.

And the said jury having heard the remaining testimony, the argument of counsel and charge of the court, retired to their room in charge of the sheriff for deliberation.

And the hour of adjournment having arrived the court ordered that if said jury agree upon a verdict they return the same sealed to this court tomorrow at —— o'clock.

No. 863.**Entry Discharging Jury on account of Sickness of Juror—
R. S. Sec. 5195.***[Caption.]*

This day came the parties herein, by their attorneys, also came the following-named persons as jurors, to wit: [*name*

them], who were duly impaneled and sworn according to law; and thereupon this cause came on for hearing on the pleadings and the evidence, and said jury having heard the evidence in part, and it appearing that —, one of the above jurors, during the hearing of the testimony became sick and was unable to attend a further hearing of said testimony,* the court therefore discharges said jury; and this cause is continued.

No. 864.

Entry allowing Cause to be tried by remaining Jurors in Case of Sickness or other calamity.

[*Caption.*]

[*Proceed as above to*, then state:*] that —, one of the above jurors, during the hearing of the testimony in said case became sick and was unable to attend a further hearing of said testimony, by consent of both parties the trial proceeded with the remaining eleven jurors in attendance.

No. 865.

Jury—Entry discharging Jury under R. S. Sec. 5195.

[*Caption.*]

This day came the parties, by their attorneys, also came the jury heretofore impaneled and sworn, and this cause came on for trial. And by consent of both parties said jury are discharged without day, and this cause is continued at the costs of —.

No. 866.

Jury—Entry withdrawing Juror and cause continued.

[*Caption.*]

This day came the parties, by their attorneys, also came the jury heretofore impaneled and sworn, and this cause came on for hearing, and by consent of parties, —, one of said jurors, is withdrawn from the panel, and the remaining jurors are discharged from further attendance in this case, and this cause is continued at the costs of —.

No. 867.

**Entry on return of Verdict—Giving notice of motion for
New Trial.**

[*Caption.*]

This day again came the parties, by their attorneys, and also came the jury in this cause, who were duly impaneled and sworn, and affirmed on a previous day of the present term of this court, and after hearing the evidence and arguments of counsel and the charge of the court, the jury retired in charge of the sheriff, and afterward returned into open court their verdict, which is in the words and figures following, to wit: [*Copy verdict.*]

Which said verdict was by the clerk of this court read in the hearing of said jury, to which they gave their assent, and the jury being polled at the request of the defendant's attorney, each juror, on being inquired of if it was his verdict, answered in the affirmative. Thereupon the defendant, by his attorney, gave notice of his intention to file a motion for a new trial of this cause.

No. 868.

Special Verdict under P. S. Secs. 5200 and 5201.

[*Caption.*]

We, the jury, on the issues joined in this case, find the following facts: [*here state the findings of fact.*]

We do further find, that if under the above finding of facts the law is with the plaintiff, we do find for plaintiff, and assess his damages at \$——; and if under the above finding of facts the law is with the defendant, we do find for the defendant and assess his damages at \$——.

No. 869.

Entry Discharging Jury when Unable to Agree.

[*Caption.*]

This day came the parties, by their attorneys, also the jury heretofore impaneled and sworn, and said jury retire to their room for further deliberation, and afterwards said jury return into court and inform the court that they are un-

able to agree upon a verdict, and the court find that said jury are unable to agree, and for this reason said jury are discharged from the further deliberation of this case.

R. S. Sec. 5195.

No. 870.

Entry Overruling Motion to direct Verdict —Requests to Charge, etc.—Overruling Motion for New Trial.

[*Caption.*]

This day, immediately upon the close of the evidence in this case, the defendant moved the court to direct the jury to return a verdict in favor of the defendant, and after hearing the arguments of counsel, the court being fully advised in the premises, the court overruled said motion, to which ruling the defendant at the time excepted, and thereupon the counsel for the defendant asked the court to give to the jury special charges, which the court refused to give, and then instructed the jury.

And thereupon the said defendant, by its counsel, at the time and in the presence of the jury, excepted to the charge and each separate portion and proposition therein contained; and thereupon the jury retired to deliberate upon their verdict, and afterwards on the same day returned into court with their verdict in writing as follows, to wit:

Verdict: We, the jury, being duly impaneled and sworn and charged, find the issues in this case in favor of the plaintiff and assess the damages at \$——.

J. W. S., Foreman.

And thereupon, on the rendition of said verdict, the defendant gave notice to the court of its intention to file a motion for a new trial in this cause, and to set aside said verdict, and afterwards, to wit, on the —— day of ——, A. D. 18——, being within three days from the rendition of the verdict in this case, the defendant filed its motion for a new trial of this cause for reasons in said motion stated, which was argued by counsel, and upon consideration whereof the court overruled said motion and refused to set aside said verdict and grant a new trial of this cause, to which ruling of the court in refusing to set aside said verdict and grant a new trial of this cause the defendant at the time excepted and asked and obtained leave of the court to prepare and present its Bill of Exceptions in this case and have the same made part of the record within forty days from the rising of this

term of this court, and for the purpose of permitting and allowing said Bill of Exceptions to be prepared, allowed, signed and sealed and made a part of the record in this case, it is ordered that said records and journals of this court be kept open for said — days.

No. 871.

**Entry of Impaneling Jury—Verdict—Motion to set same
aside sustained.**

[*Caption.*]

This cause came on for trial, and the parties came by their attorneys; a jury being called, came the following named persons, to wit:

who were duly impaneled and sworn according to law.* Said jurors having heard the evidence adduced by the parties, the argument of counsel, and the charge of the court, retired to their room in charge of the sheriff for deliberation. After due deliberation said jurors returned into open court with their verdict in writing, signed by their foreman, as follows:

“We, the jury in the above-entitled cause, find the issues joined in favor of the plaintiff, and assess her damages at \$——.”

The defendant having thereupon filed its motion to set aside said verdict and for a new trial of this cause, the same came on for hearing, and was heard and submitted to the court; and the court, on consideration thereof, grant the same; and the verdict is set aside and a new trial granted, to which the plaintiff excepts.

No. 872.

Entry Arresting case from Jury.

[*Caption.*]

[*Proceed from *, ante No. 871.*]

And the hearing of the evidence having been concluded the defendant thereupon made a motion to arrest the case from the jury, which came on for hearing, was argued by counsel and submitted to the court. On consideration whereof the court sustains said motion, and orders that the testimony in said cause be and the same is hereby arrested

from the jury, and the jury is discharged from the further consideration of this cause. It is further ordered that the defendant be dismissed from this action, and that he recover from plaintiff herein his costs.

No. 873.

Ordering Jury in Criminal Cases to View Premises.

[*Caption.*]

It appearing to the court that it is necessary to a proper understanding of the evidence in this case that the jury should have a view of the place where the crime charged in the indictment is alleged to have been committed, it is ordered that the said jury be conducted in a body, together with the defendant and his counsel, in charge of the sheriff, to the place where said crime is alleged to have occurred, to wit: [*It might be stated*]; and that said place be shown to said jury by A. B., whom the court here appoints for that purpose, and that when they have made said view that they return immediately into court.

R. S. Sec. 7283.

No. 874.

Entry—Discharging Jury in Criminal Case under R. S. Sec. 7313.

[*Caption.*]

It having been made to appear to the court that —, one of the jurors heretofore impaneled herein, has become sick, and unable to proceed further in the trial of this cause, it is therefore considered and ordered that the said jury be discharged from the further consideration of said cause and without prejudice to the prosecution of this cause.

No. 875.

**Entry granting Motion in Arrest of Judgment under
R. S. Sec. 7355.**

[*Caption.*]

This cause came on to be heard upon the motion filed herein to arrest the judgment, was argued by counsel and submitted to the court. On consideration whereof, and the

court being fully advised in the premises, does sustain said motion. * It is therefore ordered that said defendant be and he is hereby discharged.

(*Or, from* * And it appearing to the court there are reasonable grounds for believing said defendant guilty of an offense, it is ordered that he enter into a recognizance in the sum of \$——, conditioned for his appearance at the first day of the —— term of this court, and in default thereof that he be committed to the county jail.)

TRIAL BY COURT.

(*R. S. Secs. 5204—5209.*)

No. 876.

Entry of Trial to Court—Jury waived—Ordinary Judgment.

[*Caption.*]

This cause coming on to be heard on the petition, the answers of J. H., C. S. and M. W., and the reply of the plaintiffs, and a jury having been waived, was submitted upon the pleadings and the evidence, and argument of counsel to the court; and on consideration thereof, the court finds on the issue joined for the plaintiffs (and that the facts and allegations in the petition are true), and that the defendants, J. H., C. S. and M. W., are indebted to the plaintiffs in the sum of \$——, with interest from the first day of this term.

It is therefore considered by the court that said plaintiffs recover from the said J. H., C. S. and M. W. the said sum of \$——, together with the costs of this action, for which execution is awarded, to all of which defendants, W. and H., except.

No. 877.

Finding and Judgment in favor of Defendant.

[*Caption.*]

This cause coming on to be heard was submitted to the court by the parties hereto upon the petition, the answer of

E. L. and the reply herein, the evidence and the exhibits; and both plaintiff and defendant having waived trial by jury, the court finds upon the issues joined for the defendant, E. L.; and that that the plaintiff has no cause of action against the said defendant, E. L., and the court adjudges and orders that said E. L. may go hence without day and with his costs which he may recover against the plaintiff, and that the plaintiff shall pay all the costs herein made, taxed at \$—, and upon failure to so pay the same within — days from this date, execution shall issue therefor against the plaintiff.

No. 878.

Entry of Trial by Court by Consent of Party appearing, the other Party failing to appear, under R. S. Sec. 5204.

[*Caption.*]

This cause coming on to be heard on the petition of plaintiff and the answer of defendant, the defendant failing to appear, and the plaintiff waiving trial by jury, and consenting to a trial by the court, and the court having heard the testimony, * and being fully advised in the premises, finds on the issues joined for plaintiff, and that the defendant is indebted to the plaintiff in the sum of \$—, with interest from the — day of —, 18—.

It is therefore considered by the court that plaintiff recover from the defendant said sum of \$—, with interest for said sum from said — day of —, 18—.

No. 879.

Entry of Trial by Consent Orally made in Open Court under R. S. Sec. 5204.

[*Caption.*]

This cause coming on to be heard on the petition of plaintiff and the answer of defendants, the parties hereto having, in open court, waived trial by jury and consented to a trial by the court, and the court having heard the testimony [*then follow as in ante No. 878, from **].

No. 880.**Entry where the Court must state Finding of Law and Facts under R. S. Sec. 5205.**

[*Caption.*]

This day this cause came on to be heard on the petition of plaintiff, the answer of defendant, and the reply thereto, and on the testimony of witnesses, and was argued by counsel.

And thereupon the court being asked to separately state its findings of facts and its conclusions of law in this case, the court finds from the testimony as facts in this case, the following: [*statement of facts.*]

The court finds as conclusions of law that [*statement of conclusions at law.*]

It is therefore considered by the court that the defendant go hence without day and recover of the plaintiff his costs herein expended, to which conclusions of law, upon said findings of facts, the plaintiff, by his counsel, at the time accepted.

See Kinkad's Code Pleading, Sec. 1248.

No. 881.**Entry of Trial by Court by Written Consent of Parties filed with the Clerk—Under R. S. Sec. 2504.**

[*Caption.*]

This cause coming on to be heard on the petition of plaintiff and the answer of defendant, the parties hereto having filed with the clerk their written consent for a trial by the court, and the court having heard the testimony [*then proceed as in ante No. 878, following **].

No. 882.**Entry of Trial of Agreed Case by Court.**

[*Caption.*]

This day this cause came on to be heard upon an agreed statement of facts containing the facts upon which the controversy involved herein depends, heretofore filed herein and submitted to the court, and it appearing to the court from

the affidavit of — that the controversy is real, and that said proceeding is in good faith, and the court being fully advised in the premises, finds upon said statement the law to be in favor of —, and that there is due him the sum of \$—.

It is therefore ordered that said — recover from the plaintiff [*or*, defendant] said sum of \$—, with interest, and his costs herein expended, taxed at \$—, for which execution is awarded.

R. S. Sec. 5208.

No. 883.

Entry Overruling Motion to Dismiss—Demurrer—And Hearing upon Agreed Statement of Facts.

[*Caption.*]

This day came the said parties, by their respective attorneys, and thereupon this cause came on to be heard upon the motion of defendant to dismiss this action for the reason that the court has no jurisdiction to hear and determine the same. On consideration whereof the court overrules said motion; to which judgment and determination of the court in so overruling said motion the defendant by its counsel now duly excepts; and thereupon this cause came on to be further heard upon the demurrer of the defendant to the petition of the plaintiff, and the same was argued by counsel.

On consideration whereof the court overruled said demurrer; to which judgment and determination of the court in so overruling the same, the defendant, by its counsel, now duly excepts and asks leave to answer said petition instanter, which leave is now granted accordingly.

And thereupon this cause came on to be still further heard upon said petition and answer, and upon the agreed statement of facts filed herein and by consent of all parties made evidence in this cause. On consideration whereof, the court find [*proceed from * in ante No. 878*] that the defendant is a corporation, authorized by law to make appropriation of private property; that the defendant has taken possession of and is using the land of the plaintiff described in the petition; that said land so occupied and used by the defendant has not been appropriated or paid for by the defendant corporation; that said land is not held by any agreement in writing, the owner thereof, who is the plaintiff herein, and that the notice required by the provisions of section 6448 of the Revised Statutes of Ohio, as

amended April 12, 1883, has been duly and legally served upon the defendant corporation. To all of which findings of the court the said defendant by its counsel now duly excepts.

It is therefore ordered, as directed by statute, that a jury be drawn, as required by law, for the trial of this cause; and that said jury be summoned to appear in this court on the — day of —, 18—, until which time this cause is now adjourned.

TRIAL BY REFEREES.

(*R. S. Secs. 5210—5218.*)

No. 884.

Entry ordering Reference by Consent.

[*Caption.*]

This day came the parties, plaintiff and defendant herein, and waiving their right to a trial by jury, filed herein their written consent [*or, in open court consented*] that this cause be referred to referees to report their decision upon all the issues of fact and law involved herein; and it appearing to be for the best interest of the parties hereto, it is therefore ordered that this cause be and the same is hereby referred to [*name referees*], for the trial of all the issues of fact and law [*or, of special matters*] involved in said cause. It is further ordered that the said referees reduce all the testimony of the witnesses to writing, and that they severally subscribe the same, and that they make report of their decision to this court without delay.

[Whittaker's Civil Code, Sec. 5210 and notes. In all cases in which right to trial by jury exists, consent to a reference is necessary. *Id.* Kinkead v. Hiatt, 39 N. W. 600 (Neb.); Larder v. Granger, 21 N. Y. S. 1107. As the parties in effect must waive a jury, it is best to incorporate the waiver in the entry, although a submission of a cause triable by a jury to a referee is a revivor of trial by jury. 22 O. S. 372. A reference can not be ordered by the Probate Court without consent of parties. R. S. Sec. 5215.]

No. 885.

Compulsory Order of Reference.

[Caption.]

It appearing to the court that the parties to this action are not entitled to a trial by jury upon the issues raised herein, and that it would be for the best interest of the parties that said cause be referred to referees, it is therefore ordered that said cause be referred to [naming referees], who are hereby directed and required to ascertain and determine the facts and law, and report them to this court without unnecessary delay.

R. S. Sec. 5211.

No. 886.

Order Appointing Referee to Ascertain and Report Names and Liabilities of Stockholders in Corporation.

[Caption.]

This cause came on to be heard upon the petition and motion of plaintiffs herein to appoint a referee, and the answer of the defendant herein. The court being fully advised, adjudges that said plaintiffs are entitled to have a referee appointed in this cause to ascertain and report to this court the names and addresses of the stockholders of the M — V — Railway Company from its organization to the date of bringing of this action, the amount of stock held by each stockholder, when and how acquired, and if sold, when and to whom, and the individual liability thereon; also the names and addresses of the creditors of said corporation, the amounts owing to each, and the amounts necessary for each share of stock to pay to discharge the indebtedness of said corporation; and it is ordered that this cause, for the issues and things aforesaid, be and the same is hereby referred to J. D. H., who is hereby appointed referee herein, to hear, try, and determine the same, both as to law and to fact; and the said referee is ordered to report his findings and decisions to this court without unnecessary delay, and also the testimony before him, each witness or deponent to sign his name to his testimony, in pursuance to the statute in such cases made and provided.

From John Ferris v. James Anton, *et al.*, (S. C.) R. S. Secs. 5211, 5213.

No. 887.

Another Order appointing Referee upon Motion for further Reference—To determine Stockholder's liability—Ordering Publication of Appointment.

[*Caption.*]

And now this cause came on to be heard on motion for further reference of the cause, and upon pleadings and proceedings, and the court having considered the same, it is now ordered that the special master, J. D. H., do forthwith make report of the findings by him made, if any, of the testimony by him taken or now held, and his proceedings on the claims filed with him against the company aforesaid; and he is now ordered to transfer all the books and papers held by him relating to the affairs and transactions of the said company, and not constituting a part of the evidence aforesaid, to the referee hereinafter appointed.

And the court, further considering the premises, finds that since the order heretofore made appointing said H. special master, this cause has been brought into a condition in which, by the making of the proper parties, the answers and other pleadings of some, and the defaults of others, issues are presented in the cause as to their rights and liabilities, which are now ready for examination and decision; and the court further finds that for the speedy and convenient determination of such issues and of the judgment to be rendered thereon, it is advisable to refer this cause to a referee.

Wherefore it is ordered that this cause, with all the issues herein, whether the same arise upon the pleadings or defaults of the parties, and whether the same be of fact or law, except the claim of J. B. B., hereinbefore provided for, be referred to J. D. H., Esq., an attorney of this court, as referee under chapter 2, of division of title 1, who shall proceed to hear and determine:

First. As to the validity and amount of each claim made against the said company and its stockholders.

Second. As to the liability of the several defendants, stockholders of said company.

Third. The relief and judgment the several parties are entitled to in the cause.

And for this purpose he is authorized and directed to make publication of his appointment in newspapers of general circulation within the counties of — and — in this state, for two weeks, of the time and place he will begin the exam-

ination of such claims as may already have been presented to and filed with the master aforesaid, or set up in the pleadings, or such as may during this proceeding be presented and filed with him, and thereafter creditors and parties shall take notice of such setting and order of business, as said referee shall from time to time make for the trial of the several issues referred—the said referee providing reasonable means of information at his office of such setting and proceeding for parties and creditors inquiring.

The said referee shall have such powers and shall be governed by such rules of proceeding as are prescribed for referees by title 1, division 3, chapter 2, of the Revised Statutes.

He shall receive and consider in the trial of the issues referred to him such of the testimony as may have been taken and filed herein by the master pertinent to said issues, and as may be offered by either or any party to such issue, or as he may find necessary to consider upon said issues, and report his findings, together with the evidence taken, to this court, without unnecessary delay.

John Ferris v. James Anton, S. C., Sec. 2988, Hamilton County.

No. 888.

**Entry upon Application for Reference of Cause anew upon
Refusal of first Referee to serve.**

[*Caption.*]

Now come the said parties, by their attorneys, and thereupon this cause came on to be heard upon the application of both parties for a reference of this cause anew, on the ground that one of the three referees appointed in said cause by this court at its — term, A. D. 18—, viz.: W. A. L., Esq., has refused to serve as such referee. On consideration whereof the court order, by consent of said parties, plaintiff and defendant, that all issues of fact and of law in this action are referred for trial to Honorable J. A. A., Honorable C. G. C. and M. C. R., Esq., who, on ten days' notice by either party herein, are to meet at the courthouse in A., — county, Ohio, for the trial of said action, and that they report to this court, at its next term, the facts found and the conclusions of law separately, and the evidence herein given before them on said trial, and this cause is continued.

No. 889.

Appointment of Referee to take and report Testimony.

[Caption.]

This day this cause came on to be heard and was submitted to the court, and the court, on consideration of the cause, doth find that on account of the character and extent of the evidence to be adduced, and on account of the nature of the issues to be heard and determined by the court, it is adjudged by the court, on the application of the defendant, that the case be referred to F. B. M., as such referee of this court, to take and report the testimony in the case to this court, and that his said report to report also his conclusion and findings of law and facts in the case, and the said referee is hereby empowered to compel the attendance of witnesses for the purpose of producing evidence before him for the hearing of the case, on application of either parties, by the ordinary process of law, and to issue such processes as may be necessary to that end, at such time and places as may be decided upon by said referee, and the clerk of this court is ordered to issue a certified copy of this order to said referee forthwith.

No. 890.

Entry upon Hearing of Referee's Report—Where no Exceptions have been filed.

[Caption.]

This cause coming on for hearing on the report of the referees to whom the same was heretofore at a former term of this court referred, on consideration whereof, no exceptions to said report having been filed, the court do order that the said report and all the matters and things therein contained be and they are hereby approved and confirmed, and that the findings of the said referees do stand as the findings of the court.

It is therefore considered and adjudged by the court that the said B. H. do go hence without day and recover from the said plaintiff his costs herein and heretofore made and expended in this case. [*Proceed with judgment in accordance with motion for new trial.*]

No. 891.

Entry on Report and Motion for New Trial—Overruling
or Sustaining.

[Caption.]

This day this cause came on to be heard upon the report of A. B., C. D. and E. F., referees herein, of their findings of facts and conclusions of law, and the motion of J. H., the defendant herein, to vacate and set the same aside, and for a new trial of said cause before said referees. And the court being fully advised * does overrule said motion, and finding that said report is in all respects regular, and that the conclusions of law of said referees are in all respects correct, the said report is approved and confirmed; and it is ordered [*make order in conformity to report*] [*or from **] does sustain said motion and order that the said report be and the same is hereby set aside and vacated, and a new trial is granted of said cause. It is therefore ordered that said cause be recommitted to the said A. B., C. D. and E. F., as referees, who are hereby ordered and directed to proceed to a new trial of said cause, and that when they have so complied with this order they shall file in this court a new report of their findings of fact [and law] without unnecessary delay.

No. 892.

Entry on Motion to Confirm Report of Referee.

[Caption.]

The motion of the plaintiff to confirm the report of the referee herein, filed on the — day of —, 18— [*or, the exceptions filed on the part of the defendants to the report, etc., as above*], having come on for argument, on the motion of the plaintiff to confirm said report [*or, of the defendant to set aside said report*], and after reading said report [and the evidence taken by said referee, *may add*, and his opinion therewith filed, and] after hearing A. T., of counsel for defendant, in opposition, now, on motion of A. T., attorney for plaintiff:

It is ordered that the exceptions of the defendant to the report of the referee herein be and the same hereby are * overruled, and that the said report be and the same is hereby in all things confirmed; to which ruling of the court the defendant excepts, and that [*state principal relief according to the case*].

No. 893.

Entry Sustaining Exceptions to Referee's Report.

[*As above, substituting for the words following the **] sustained, and the motion to confirm said report is denied, with \$— costs to the —, and that said report and order of reference are hereby vacated and set aside; to which ruling of the court the plaintiff excepts.

TRIAL BY MASTER COMMISSIONER.

See also STOCKHOLDER'S LIABILITY.

(*R. S. Secs. 5219—5224.*)

No. 894.

Reference to Master.

[*Caption.*]

This day this cause came on to be heard, and upon motion of counsel for plaintiff (and by consent of counsel for defendant), and it appearing that the parties hereto are not entitled to a trial by a jury, this cause is referred to J. L., one of the [*or, a*] Master Commissioners of this court to hear and try this cause on the pleading and evidence, and to take and report to this court the testimony in writing, together with his finding and conclusions of the law and facts involved in the issues, and to make his report to this court without unreasonable delay.

R. S. Secs. 5219, 5222.

No. 895.

Appointment of Special Master Commissioner.

[*Caption.*]

On motion to the court by the parties herein, and on good cause shown, it is ordered that this cause be, and the same hereby is, referred to C. N. B., who is hereby appointed a Special Master Commissioner for that purpose, who shall

forthwith, upon being duly qualified, proceed to take the testimony offered by the parties, in writing, ascertain the state of account between them, and report the same to the court, with his conclusions on the facts involved in the issues, without unnecessary delay.

R. S. Secs. 5221, 5222.

No. 896.

Entry Appointing Special Master Commissioner to take Testimony.

[*Caption.*]

[*Precede with other findings.*]

It is therefore ordered, adjudged, and decreed, by the court here, that W. H. D. be and he is hereby appointed Special Master Commissioner in this cause, who, by agreement of the parties, is not required to give bond, and is ordered upon notice to the parties to take testimony and report for the information of the court the following facts, to enable the court to thereby find judgment between the parties in this case.

1st. The consideration paid by said D. to said K. for said premises.

2d. The amount paid by C. and E. S. to said D. on their contract of purchase.

3d. The amount of taxes paid by S. and wife on said premises since they purchased the same of said W. D., including whatever sidewalks they may have made, or improvements they may have made to sidewalks, curb and gutter in front of said premises, each item, and be stated separately.

4th. The present value of said lot, with the improvements that was on it at the death of H. F., and including all other improvements.

5th. The present value of said lot with all the improvements now on it.

6th. The value of the improvements made to said premises by S. and wife, D. or K., separately.

7th. The value of the use and occupation of said premises by S. and wife, and by D. and K., separately.

8th. And such other facts as may be necessary to enable the court to determine the rights at law of the parties to this suit. It is further ordered that the said Master give notice to the parties of the time and place of taking

testimony and the hearing of the said issues, and report his findings therein to this court at the next term thereof, to which this cause is continued.

Notice of appeal by W. D., and bond fixed at \$——. Notice of appeal by G. K., and bond fixed at \$——.

R. S. Sec. 5221.

No. 897.

**Approval of Master's Report and Judgment thereon, where
no Exceptions are taken thereto.**

[*Caption.*]

This day this cause came on to be heard on the motion of the defendants herein to confirm the master's report and for judgment on the findings of said master, and the same was argued by counsel and submitted to the court, and no exceptions having been filed to said report, and the court, on consideration thereof, and being fully advised in the premises, finds that said motion is well taken and ought to be sustained, that the conclusions of fact and law, so made by said master, are in all respects correct and in conformity to law.

It is therefore considered, ordered, decreed and adjudged that the said master's report be and the same is hereby in all respects confirmed, and it is further considered, ordered and adjudged by the court that the said defendants recover of the plaintiff the amount of money, to wit: \$——, so in the master's report found to be due the defendants from the plaintiff, with interest on said amount, and their costs herein expended.

No. 898.

Confirmation of Report of Master.

[*Caption.*]

This cause came on to be heard upon the motion of the defendant [*or, plaintiff*] to confirm the report of F. D., master commissioner herein, and for judgment, and the court having examined the report of said master, filed —— —, 18—, and his proceedings herein, find the same to be correct and regular; and being further advised in the premises, and having heard the argument of counsel, and after due consideration, the court is of opinion that the report should be confirmed. It is therefore ordered and adjudged that said report be and the same hereby is confirmed, and that the said defendant,

D. B., recover of the said J. T. B., as receiver of the P. C. B., the sum of \$——, with continuing interest from the first day of the present term of this court. It is further ordered that for his fees and expenses herein said master be allowed the sum of \$——, which sum, together with the other costs of this suit, taxed at \$——, is to be borne equally by said plaintiff and defendant, and in default of payment, execution may issue therefor. And thereupon the said J. T. B., as receiver, plaintiff in the above-entitled case, gave notice of his intention to appeal this cause to the circuit court of —— county, Ohio, and the court finding that the said plaintiff has already given bond in his trust capacity as receiver as aforesaid, order that said plaintiff is not required to give bond and security to perfect such appeal, but that said appeal is perfected by this notice and entry.

Black, Receiver, v. Boyd, S. C., 3653.

No. 899.

Entry where Exceptions are filed to Report.

[*Caption.*]

This day this cause came on to be heard upon the report of ——, master commissioner, to whom this cause was heretofore referred and the exceptions filed thereto by ——, and was argued by counsel and submitted to the court. On consideration whereof, and the court being fully advised in the premises, finds that said exceptions are not well taken, and does therefore overrule the same, to which finding and judgment the ——, by his counsel, excepts. And the court having carefully examined said report, and finding the same in all respects in conformity to law, does therefore approve and confirm the same.

It is therefore considered, adjudged and decreed by the court that the said report of the said master be and the same is hereby approved and confirmed as the judgment and finding of the court, etc. [*proceeding with decree, as in ante Nos. 897, 898*].

No. 900.

Entry Sustaining Exceptions.

[*Caption.*]

This day this cause came on for hearing upon the report of the master commissioner heretofore filed herein, and the exceptions filed thereto by —, and the court having heard the arguments of counsel, the same was submitted to the court.

On consideration whereof, and the court being fully advised in the premises, find that said exceptions are well taken (in this to wit: —), and does therefore sustain the same [*or*, sustains the same to wit: —, and does overrule the remainder thereof].

It is therefore considered, ordered, adjudged and decreed that the said report be and the same is hereby set aside and held for naught.

TRIAL ON APPEAL.

(R. S. Secs. 5225—5239.)

No. 901.

Notice of Appeal.

Persons desiring to take an appeal must within three days after the judgment or order enter on the records notice of such intention. Whitaker's Civil Code, Sec. 5227 and notes. Kinkead's Pleading, Sec. 1227.

This is done usually at the end of the entry prepared by the successful party, as follows:

[*Caption.*]

And now comes the plaintiff [*or*, defendant] and gives notice of his intention to appeal this case to the circuit court,* and the court fixes the appeal bond in the sum of \$——.

*An administrator in taking an appeal, having given bond, is not required to give an appeal bond, and in an appeal by him proceeding from *, and the said A. B., administrator, having already entered into a bond as such administrator, no appeal bond is required of him.*

Appeal bond when given. Kinkead's Code Pleading, Sec. 1228.

No. 902.

Entry of Notice by Administration to appeal Case decided against him.

[*Caption.*]

[*Give entry suitable to finding and decree of court. Then proceed as follows:*]

To which finding and judgment of the court defendant excepts, and gives notice of his intention, and hereby causes notice of his intention to appeal said cause to the circuit court, and said defendant being an administrator, the court finds no appeal bond is necessary.

Notice of intention to appeal. R. S. Sec. 5227. Kinkead's Code Pleading, Sec. 1227. Whittaker's Civil Code, Sec. 5227 and notes. Administrator need not give bond. R. S. Sec. 5228.

No. 903.

Suspension of Injunction by Circuit Court.

[*Caption.*]

This day came the defendant herein, and thereupon the motion of said defendant for an order suspending the operation of the injunction heretofore allowed in this cause by the common pleas court, and upon producing proof of reasonable notice to the adverse party of the hearing of this motion, and it appearing that defendant has executed a proper appeal bond, it is ordered that the order of the said court of common pleas, granting an injunction [*state what injunction is*], be and the same is hereby suspended until the final determination of this case by this court.

Whittaker's Civil Code, Secs. 5226, 5235; 6 Bull. 138. The statute requires "reasonable notice to the adverse party," but the practice in staying executions on judgments and final orders is uniform in holding that the power is discretionary, and will only be exercised upon good cause shown. 7 O. C. C. 182-3, and cases cited. As to suspension of judgment. Kinkead's Code Pleading, Sec. 1231.

No. 904.

Appeal—Dismissal of, because Jury Case.

[*Caption.*]

This day came the parties by their attorneys, and thereupon on motion of said defendants leave was granted them

to renew their several motions to dismiss the appeal of this case, to which ruling of the court the plaintiff excepted.

And thereupon this cause came on to be heard upon the several motions of the defendant to dismiss the appeal of this case, was argued by counsel and submitted to the court. On consideration whereof the court is of the opinion that either party had a right to demand a trial by jury in this cause, and that the cause is not therefore an appealable one, and therefore orders and adjudges that the former orders made and returned by this court on the — day of — 18—, at the — term of this court, and overruling the motions of the defendant to dismiss the appeal, be and the same are hereby set aside and vacated, and doth further order, adjudge and decree that the appeal of this case be and the same is hereby dismissed.

No. 905.

Judgment set aside and leave to file Petition on Appeal and Answer.

[*Caption.*]

This cause being heard on the motion of the defendant to set aside the judgment rendered herein at a former term of this court, to wit: on —, 18—, the court finds on consideration thereof that said judgment was irregularly obtained in this, to wit: that the petition on appeal was filed out of rule and without leave of court or consent of defendant.

It is therefore considered and adjudged by the court that said judgment be and the same is hereby conditionally set aside, and plaintiff is hereby granted leave to file his petition on appeal instantler, which is accordingly done, and leave is granted defendant to file answer on or before —, 18—.

Kinthead's Pleading, Sec. 1232.

No. 906.

Upon motion to Dismiss Appeal.

[*Caption.*]

This cause came on to be heard on the motion of M. L. and J. E. to dismiss the appeal heretofore taken to this court in this action, and was argued by counsel and submitted to the court. Whereupon the court find said motion not well taken, and the same is therefore overruled at the costs of the persons making said motion, to wit: said K., F., H. and B., to which said defendants except.

No. 907.

Entry upon motion to require Plaintiff to give new Undertaking in Appeal.

[Caption.]

Now come the parties herein, by their attorneys, and thereupon this cause came on to be heard upon the motion of the defendants requiring the plaintiff herein to give new undertaking in appeal in this case, and was argued by counsel; on consideration whereof the court grants said motion. It is therefore ordered by the court here, that the said plaintiff do give a new undertaking in appeal, in the sum of \$—, with surety, to the acceptance of the clerk of this court, said bond to be given within thirty days after the entry of the judgment.

NOTE.—R. S. Sec. 5227; 89 O. L. 148. See Kinkead's Code Pleading, Sec. 1228.

No. 908.

Appeal from Justice Dismissed because not perfected, and Judgment for Appellee.

[Caption.]

This day came the plaintiff herein and filed a transcript of the proceedings and judgment of F. B., justice of the peace in and for — township, — county, Ohio, in a certain action between the above-named parties, from which it appears that on the — day of —, 18—, a judgment was rendered by said justice in favor of this plaintiff and against this defendant for the sum of \$— and \$— costs of suit, from which judgment the said defendant appealed, and it appearing to the court that the appellant has failed to deliver a transcript of the proceedings and judgment aforesaid to the clerk of this court and cause his appeal to be docketed within the time required by law, and the said S. D. C. now electing to have judgment in this court:

It is therefore considered by the court that the said S. D. C. recover from W. L. K. the sum of \$—, and the judgment and \$—, costs of suit aforesaid, with interest from the — day of —, 18—, together with his costs herein in this court expended, taxed at \$—, and execution is awarded therefor.

No. 909.

Hearing and Judgment in Circuit Court.

[*Caption.*]

This day this cause came on to be heard upon the pleadings and evidence, and was argued by counsel. On consideration whereof the court finds for the plaintiff [*as in Common Pleas*].

It is therefore considered, adjudged and decreed [*as in Common Pleas Court, as in next No. 910*].

And the court being satisfied that there was reasonable and probable ground for the appeal, and that the same was not for delay, no penalty is assessed.

[*Or, And the judgment now rendered herein, being substantially the same as that rendered in the court below, and the court being satisfied that there was no reasonable ground for this appeal, or that the same was prosecuted for mere delay, the court therefore adjudges and decrees that the said defendant shall pay to the plaintiff a penalty of the sum of \$——.*]

It is further ordered by the court that this cause be remanded to the Court of Common Pleas for execution, and that a copy of this order be sent to the clerk of said court.

R. S. Sec. 5238. Mandate, Sec. 5239.

No. 910.

**Decree Upon Foreclosure Ordering Sale by Appellate Court—
Quieting Title as Against Certain Interests—Appointment of
Master Commissioner to Make Sale and Distribute Proceeds
—Ordering Receiver to Pay Proceeds from Real Estate Upon
Debt.**

[*Caption.*]

This cause came on to be heard on the pleadings, exhibits and evidence, and was submitted to the court upon the argument of counsel, whereupon the court finds the issues joined in favor of the plaintiff and G. K. and against the other parties herein; and that they are entitled to the relief demanded. The court further finds that since the commencement of this action all the notes described in said petition have become due; that there is now due to the said W. D. from the defendant C. S. on said notes and mortgage the

sum of \$—— with interest from this date; that the same is secured by the mortgage set out in the petition; that said mortgage is the first and best lien on the premises described in the petition; that the plaintiff is entitled to have said mortgage foreclosed.

It is therefore considered by the court here that the said M. K., F. B. and D. B., L. F., J. H. and E. H., nor either of them have any estate, right or interest in said premises, and that the title thereto is and shall be forever quieted against the claim of them or either of them. It is further considered, unless the said C. S. or E. S. shall within ten days pay or cause to be paid to the said W. D. the said sum of \$——, with interest from this date, and costs of suit taxed at \$——, that an order of sale issue to the sheriff of —— county, Ohio, who is hereby appointed a master commissioner for that purpose, commanding that he cause said premises described in the petition to be appraised, advertised and sold according to law, and that he distribute the proceeds arising from said sale: 1st. To pay taxes now a lien on said premises. 2d. To pay the costs of this proceeding, taxed to \$——. 3d. To pay to W. D. the said sum of \$——, with interest from this date, less the amount, if any, that he shall receive from the receiver as herein ordered, and the balance, if any, remaining in his hands he is ordered to pay over to the said E. S.

And it further appearing that the receiver heretofore appointed in this action is still in possession of said property, and that any money in his hands should be applied as a credit on said mortgage claim so as aforesaid found to be due, it is ordered that said receiver pay any moneys in his hands as aforesaid to W. D., as a credit on his mortgage claim, and make report of his said receivership herein to the court of common pleas of —— county, Ohio, for its approval.

To all of which findings, orders and decrees the said defendants severally, at the time excepted, and on their motion and with consent of parties —— days from the entry of this decree is given them within which to prepare their bill of exceptions herein.

It is further ordered that a special mandate issue to the said court of common pleas of —— county, Ohio, commanding it to carry the foregoing orders into effect.

No. 911.**Entry of Decree in Circuit Court upon Appeal—Separate Finding of Fact and Law.**

[*Caption.*]

This day this cause came on to be heard by the court upon the authenticated transcript of the docket, journal entries and final judgment of the court of common pleas of said county therein, the original papers and pleadings, and certain oral admissions of facts made by the respective parties through their counsel (no other evidence being offered by either party), on appeal by the defendant, The U. C. L. I. Co., from the judgment and decree of said common pleas court, as to its claim in the third and fourth causes of action in said defendant's answer and cross petition contained; and the court having heard the case as aforesaid, and the argument of counsel, and being fully advised in the premises, on the request of the plaintiff, by her attorneys, that its conclusion of fact be stated separately from its conclusion of law, finds, as its conclusion of fact, as follows:

[*Finding of facts.*]

And as its conclusion of law upon the above-found facts, the court finds that said mortgage deed created a valid lien upon the real estate described therein; that the sum above-found due is a valid lien upon the premises described in said mortgage, and, with costs herein, taxed at \$——, is ordered paid out of the money in court arising from the sale of said premises. And this cause is remanded to the common pleas court for further proceedings according to law.

To all of which the plaintiff, C. W., by her attorneys, excepted, and thereupon filed a motion for a new trial, which is heard by the court and overruled, to which said plaintiff, C. W., then and there excepted.

No. 912.**Entry of judgment under R. S. Sec. 6588 when Appellant fails to perfect Appeal.**

[*Caption.*]

It appearing to the court that the judgment was rendered herein by —, J. P., on the — day of —, 18—, and that the said appellant, E. F., has failed to perfect his said appeal by delivering a transcript to the clerk of this court, and have

his appeal docketed within the time required by law [*or, has failed to prosecute the same, etc.*], it is therefore considered and adjudged by the court that the said —, appellee, recover from the said — the amount of the said judgment so rendered by L. E., the said justice of the peace, herein, to wit: the sum of \$—, with interest from —, 18—, together with the costs herein, taxed at \$—.

R. S. Sec. 6588.

No. 913.

Entry of judgment when Plaintiff fails to file Petition on the Answer of Defendant.

[*Caption.*]

This cause coming on to be heard upon the answer of the defendant herein, and it appearing that this action comes into this court upon appeal from A. C., justice of the peace in — township, in said county, and that the appeal was taken by the plaintiff, and that the said plaintiff has failed to file his petition, and has failed to prosecute his said appeal, and the said defendant having filed his answer herein as provided by law, setting up his claim against the said plaintiff, and the said plaintiff still failing and neglecting to file his petition, the said cause came on for trial to the court, without the intervention of a jury, and having heard the evidence adduced by the defendant, and the arguments of counsel, the same was submitted to the court.

On consideration thereof it is ordered and adjudged by the court that the said defendant recover from the said plaintiff the sum of \$— and the costs herein to be taxed, for which execution is awarded.

R. S. Sec. 6592.

MEANS OF SECURING ATTENDANCE OF WITNESSES.

(*R. S. Secs. 5246—5260.*)

No. 914.

Rule against Witness for Disobedience of Subpœna.

[*Caption.*]

This day the plaintiff, by his attorney, represented to the court that A. B. has been duly served with a subpœna herein, and has failed to appear. Upon motion of said plaintiff a rule is hereby allowed to issue against the said A. B., commanding him to appear before this court forthwith, and show cause why he should not be punished as for contempt.

R. S. Sec. 5254. For form of order against a witness for contempt in refusing to answer questions, see *Ammon v. Johnson*, 3 O. C. C. 263. As to the procedure generally, see *Kinkead's Code Pleading*, Sec. 427, *et seq.*

No. 915.

Judgment on Rule.

[*Caption.*]

This day A. B. appeared in obedience to a rule hereinbefore issued against him, and the court having heard the testimony adduced as to his disobedience of the subpœna, finds that he has been guilty of contempt of this court, and orders and adjudgeth that he pay a fine of \$—— and the costs of this proceeding.

No. 916.

Entry Ordering Attachment of Witness.

[*Caption.*]

Upon motion of A. B., attorney for plaintiff [*or*, defendant], and it appearing to the court that J. has been duly sub-

pœnaed as a witness herein, and fails to appear, it is ordered that a writ of attachment issue, directed to the sheriff, commanding him to arrest said J. and bring him before this court on the — day of —, 18—, to give his testimony herein, and answer for contempt.

R. S. Sec. 5253.

No. 917.

Entry Discharging Attachment.

[*Caption.*]

This day came the sheriff with the said J., in pursuance of the writ of attachment heretofore issued herein against the said J., and the court having heard the testimony concerning the alleged contempt of the said J., upon consideration thereof orders that said attachment be discharged at the costs of \$—.

R. S. Sec. 5253.

ADMISSION AND INSPECTION OF DOCUMENTS.

(*R. S. Secs. 5288—5293.*)

No. 918.

Form of Journal Entry Ordering Inspection and Copy.

A. B.,	} Plaintiff,
v.	
C. D.,	
	Defendant.

This day this cause came on to be heard upon the motion of the plaintiff for an order granting him the right and privilege to inspect and copy certain books and documents in the possession of the defendant, and the evidence and arguments of counsel. And it appearing that demand and reasonable notice has been given to the defendant of the filing and of the time set for the hearing of this motion, and upon a care-

ful consideration of the evidence adduced, finds that said motion is well taken, and that the plaintiff is entitled to an inspection and copy of the books and papers mentioned and set forth in said motion.

It is therefore ordered by the court that the plaintiff shall have the right and privilege within — days from the date of this order, after having given notice to said defendant, to inspect and copy the books and papers specified in said motion, and the defendant is ordered to deliver into the possession of said plaintiff said books, papers and documents described in said motion, and to grant him the privilege of inspecting and copying the same within the date aforesaid. And it is further ordered that if the defendant shall fail to grant said privilege of inspecting and copying said books, the same shall be excluded from being given in evidence.

NOTE.—The Code evidently contemplates that when such books and papers are desired as evidence by the party applying, and there has been a failure on the part of the defendant to comply with the order for an inspection and copy, the court shall direct in its charge to the jury that the facts are such as the party by affidavit alleges them to be. It is therefore unnecessary to express in the order anything in reference to the facts; but the affidavit, setting forth in detail what the facts, as shown by such books and papers, are, should be produced at the trial.

No. 919.

Journal Entry appointing Master to make Private Examination of Books and Documents.

In the Court of Common Pleas of — county, Ohio.

A. B., Plaintiff, v. C. D., Defendant.	}	Entry appointing master to make private examination of books and papers.
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This day this cause came on to be heard upon the motion of the defendant herein, for an order appointing a master to inspect certain books, papers and documents therein specified, an inspection and copy of which is sought by the plaintiff in this action, and the court having heard the evidence and arguments of counsel finds that said motion is well taken and that said books are of a mere private nature, and therefore orders that E. F. be and he is hereby appointed as a master to examine privately the following books, papers and documents, to wit:

[*Description of books.*]

And it is further ordered that E. F., as such master, without unnecessary delay, make a private examination of said books, documents and papers, and report to this court by the — day of —, 18—, whether such books, papers and documents contain matter pertinent to this cause, and whether they should be properly produced, inspected and copied. And it is further ordered that if said master finds that any portion or portions of said books, papers and documents should properly be produced, inspected and copied, he shall make copies of such portions as may be pertinent to this cause, and report the same to this court by the date above named.

No. 920.

Order on Oral Application to Defendant to allow Inspection of Record.

[*Caption.*]

This day came the plaintiff, by his attorney, and on oral motion to the court, which was argued by counsel for plaintiff and defendant, and it being shown to the court that proper notice was given to the defendant in that behalf on the — day of —, 18—, for an inspection and copies, or permission to take copies of the several books, memorandum sheets and records of the F. M. C., as described in said notice, and the court doth find that the plaintiff's attorneys are entitled to said inspection and copy, and does therefore order that defendants grant the attorneys of plaintiff an inspection and copies, which with permission to take a copy of the same. And also such memorandum or record as will show the amount of money paid, and it is ordered that said inspection shall be granted and permitted to begin on the — day of —, 18—, at — o'clock.

No. 921.

Entry of judgment of Dismissal against Plaintiff failing to produce Books.

[*Caption.*]

Upon motion of A. B., defendant, and it appearing to the court that the said plaintiff has failed to comply with the order heretofore made herein requiring him to produce certain books [*or, writings*] [*name them if advisable*], and that said

books [*or*, writings] are in the possession of the said plaintiff, and that said plaintiff still refuses to comply with said order and to produce said books [*or*, writings] without showing a good and valid excuse to the court for his said refusal, and the court being satisfied that said plaintiff has no excuse for such refusal, it is therefore considered and adjudged by the court that the said action of the plaintiff herein be and the same is hereby dismissed, at the costs of plaintiff herein, taxed at \$——.

R. S. Sec. 5289. This may be modified if the defendant is one who is ordered to produce papers and refuses.

MODES OF TAKING TESTIMONY.

(*R. S. Secs. 5261—5287.*)

No. 922.

Journal Entry granting Commission.

[*Caption.*]

This day came A. B., the plaintiff [*or*, defendant] herein, and moves the court for an order granting a commission to take the deposition of C. D., who resides at ——. And the court being fully advised does order that a commission be granted, to issue to E. F., Esq., of ——, empowering and requiring him to take the testimony of said C. D., and he is ordered to return the same to this court without delay. It is further ordered that due notice of the time and place of the taking of such deposition be given to the parties to this action.

NOTE.—R. S. Sec. 5272.

No. 923.

Entry to appoint Commissioners to take Testimony in another State.

[*Caption.*]

On motion of the plaintiff herein it is ordered by the court that a commission issue under the seal of this court by the clerk hereof, directed to H. M., of the county of ——,

and state of —, empowering and requiring said H. M. to take the deposition of A. M. M., of —, of — state, upon the written interrogatories herein filed, and to return the same to this court without unnecessary delay.

Whittaker's Civil Code, Sec. 5273 and notes.

No. 924.

Entry upon Exceptions filed to Depositions.

[*Caption.*]

This day this cause came on for hearing on the exceptions heretofore filed by the plaintiff [*or*, defendant] to the depositions of C. D., taken in this cause on behalf of the defendant, and was argued by counsel. On consideration whereof the court finds that exceptions Nos. — are well taken and therefore sustains the same. And the court further finds that exceptions Nos. — are not well taken, and therefore overrules the same. It is therefore ordered that such portions of the said depositions to which the exceptions were overruled and such other portions of said depositions to which no exceptions were taken be read in the trial of the cause.

R. S. Secs. 5284-87.

No. 925.

Journal Entry on Decision of Exceptions—Another Form.

[*Caption.*]

This day this cause came on to be heard upon the exceptions heretofore filed herein by the plaintiff [*or*, defendant] to the deposition of A. B. taken in this cause on behalf of defendant [*or*, plaintiff] herein, and the court on due and careful consideration of the same finds * that said exceptions are well taken and does therefore sustain the same for the reason that [*state defects*]. It is therefore ordered that the said deposition be stricken from the files in this cause.

* [*or*, that said exceptions are not well taken and does therefore overrule the same.]

VARIANCE.

No. 926.

Entry finding Variance Material and Allowing Amendment.

[*Caption.*]

This cause coming on further to be heard to the court (and jury), and upon the objections made by the defendant that there is a material variance between the allegations in plaintiff's pleading and his proof; and it appearing to the satisfaction of the court that there is a variance between pleading and proof which has materially misled [*or*, prejudiced] the defendant, by [*state how misled, etc.*], it is therefore ordered that leave be granted to plaintiff to amend his pleading within —— days; and the jury are discharged, [*or*, by consent of parties (*R. S. Sec. 5195*) said jury is discharged from further consideration of this cause], [*or*, on application of —— A. B., a juror, is withdrawn, and the residue of said jurors are discharged], and said cause is continued.

R. S. Secs. 5294, 5295. These statutes do not provide what shall be done with the jury when it is necessary to continue the case. See R. S. Sec. 5195.

TAKING CASE FROM JURY.

No. 927.

Entry Overruling Motion of Defendant to Arrest Case from Jury —Defendant not Offering Testimony—Overruling Motion for New Trial—Verdict and Judgment.

[*Caption.*]

And now came the said parties, with their attorneys, and also came a jury, to wit, [*name them*], who were duly impaneled and sworn to well and truly try the issues joined be-

tween said parties, and thereupon said plaintiff offered his evidence to the jury and rested his case, and thereupon the said defendant moved the court to arrest said case from the jury and to direct them to render a verdict in favor of said defendant for costs, which motion was argued by counsel and submitted to the court, and the court being fully advised in the premises was of the opinion that said motion was not well taken and overrules the same, to which ruling and action of the court in overruling said motion to arrest said case from the jury and render a verdict for said defendant for costs the said defendant at the time excepted, and the said defendant not offering and having declined and refused to offer any testimony, said court duly charged the jury, and gave said jury the special instructions requested by said defendant, and thereupon said jury retired to consider upon their verdict, and after due consultation, returned into open court their verdict in writing in the words and figures following, to wit: Verdict: We, the jury, being duly impaneled and sworn, find the issues in this case in favor of the plaintiff, J. F. M., and assess the amount of his damages at \$——.

W. E. E., Foreman.

And thereupon said defendant filed its motion for a new trial for reasons therein stated, which motion was argued by counsel and submitted to the court, and the court being fully advised in the premises is of the opinion that said motion is not well taken and overrules the same, to which ruling and action of the court in overruling said motion for a new trial said defendant at the time excepted, and then and there presented to the court its certain bill of exceptions taken at said trial, as to certain rulings and actions of the court, and on motion of said defendant said bill of exceptions is signed, sealed, allowed and ordered to be placed on file and made a part of the record in this case.

It is therefore considered that the said plaintiff, J. F. M., recover of said defendant, The —— Company, said sum of \$——, his damages, so as aforesaid assessed by said jury, together with the costs of this action, taxed at \$——, to which ruling and action of the court, in giving said judgment, the said defendant at the time excepted.

No. 928.

Entry upon Motion to Arrest Testimony from Jury and for Judgment—Granting it.

[*Caption.*]

This day again came the said parties, by their attorneys, and also came the jury heretofore impaneled and sworn.

And the evidence for the plaintiff being heard, the defendants thereupon moved the court to arrest the testimony from the jury, and for judgment, and argument of counsel having been heard thereon, the court on consideration grant said motion.

It is therefore considered by the court that the evidence of the plaintiff be withdrawn from the jury, and that said jury be and hereby are discharged from further consideration of this case, and that the defendants go hence without day, and recover from the plaintiff their costs herein expended, to all of which the plaintiff excepts.

R. S. Sec. 5301.

MOTION FOR NEW TRIAL — JUDGMENT UPON VERDICT.

No. 929.

Entry Overruling Motion for New Trial—Rendering Judgment on Verdict.

[*Caption.*]

This cause came on to be heard on the motion of the defendant for a new trial of this cause, and was argued by counsel, on consideration whereof the court overruled said motion. It is therefore considered by the court that the plaintiff recover of the defendant the sum of fourteen hundred dollars, heretofore found due her, and her costs in and about this suit expended, taxed at \$—, and that defendant pay his own costs. To which ruling of the court, defendant, by his attorney, excepts. It is further ordered that the journal be kept open for — days after the date of this motion for the entering of the allowance of bill of exceptions.

R. S. Secs. 5298, 5305.

No. 929¹/₂.

Another Form.

[Caption.]

This cause coming on for hearing on the motion of the defendant to set aside the verdict and for a new trial herein, the court on consideration thereof overruled the same, to which ruling the defendant at the time excepted and asked and obtained fifty days' time in which to present and file his bill of exceptions.

It is therefore considered by the court that said plaintiff recover from the said defendant the said sum of — hundred dollars (\$——) as heretofore by the verdict of the jury found due him, together with his costs herein expended, taxed at \$——.

R. S. Sec. 5298.

 No. 930.

**Entry Overruling Motion for New Trial—Judgment upon Verdict
and allowance of Bill of Exceptions.**

[Caption.]

This day came the parties and their attorneys, and thereupon this cause came on for hearing and was heard upon the motion of said defendant for a new trial and was argued by counsel. On consideration whereof the same is overruled. To the overruling of which motion the said defendant now here excepts. Wherefore it is now considered and adjudged that the said plaintiff have and recover of the said defendant the sum of — dollars (\$——), the amount of the verdict of the jury heretofore rendered herein, together with costs taxed at \$——. And execution is awarded therefor.

To the rendering of which judgment in favor of plaintiff against said defendant the said defendant now here excepts.

And thereupon the said defendant, by its attorney, presented to the court for the allowance its certain bill of exceptions taken upon the trial of said cause. And the same having been examined is now approved, allowed and signed, sealed and ordered filed and made part of the record in said cause.

R. S. Secs. 5305, 5302.

No. 931.

Entry upon motion for New Trial in Foreclosure Proceedings.

[*Caption.*]

This cause came on for hearing upon the motion for a new trial filed by defendants therein mentioned on the — day of —, and the same was argued by counsel; on consideration whereof the court finds that said motion ought to be sustained for the reasons therein mentioned in the third, fourth, fifth and sixth grounds therein.

It is therefore considered by the court that said motion be and the same is hereby sustained and a new trial is hereby granted to said defendants for the said reasons therein set forth, and the entry made herein on —, in favor of said plaintiff and G., and against the other defendants herein, is hereby set aside and vacated; to all of which the plaintiff, W. D., and the defendant, G. K., except.

And the cause is continued for a new trial on the merits and for such other proceedings as are warranted by law, to all of which said D. excepts.

R. S. Sec. 5305.

No. 932.

Hearing upon motion for New Trial—Remittitur of portion of verdict—In consequence of which motion Overruled—Judgment Rendered.

[*Caption.*]

This cause now came on to be heard upon the motion of said defendant, The — Company, for a new trial; and the said motion was argued by counsel; thereupon the plaintiff in open court remitted from said verdict the sum of — dollars, and consented that judgment in his behalf should be entered for the sum of — dollars only, in consideration whereof the court finds that the motion of the defendant should be and the same is hereby overruled. Wherefore it is considered by court that the plaintiff, J. L., have and recover from the said defendant, The — Company, said sum of — dollars and the costs herein, to be taxed at \$—, and that execution issue therefor; to all of which rulings and judgments the defendant then and there excepted, and moved the court for leave within — days after the close of

the term of court to present, have signed, sealed and filed its bill of exceptions; which motion the court do grant and order that the same, when so allowed, shall thereupon become and be made a part of the record in this case without further order of the court.

R. S. Secs. 5305, 5302.

No. 933.

Entry Granting New Trial.

[*Caption.*]

This day this cause came on to be heard upon the motion heretofore filed herein by the defendant for a new trial, and was argued by counsel. And the court upon consideration thereof finds said motion to be well taken and doth therefore sustain the same.

It is therefore ordered that the verdict heretofore rendered by the jury herein be and the same is hereby set aside and held for naught, and that a new trial of said cause be and the same is hereby granted.

R. S. Sec. 5305; as to when a motion for new trial is necessary, see Kinkead's Pleading, Sec. 1251. This entry may be modified to suit any case.

BILLS OF EXCEPTIONS.

See also MOTIONS FOR NEW TRIAL.

(R. S. Secs. 5297—5304.)

No. 934.

Allowance of Bill of Exceptions.

[*Caption.*]

This day came the defendant by his attorneys and presented his bill of exceptions, taken on the trial of this cause; and it appearing to the court that the same has duly submitted to opposite counsel within the time requested by law, and that the time has not yet elapsed for presentation to and allowance by the court, said bill of exceptions being found

by the court to be true, is allowed, signed and sealed, and on motion is hereby made part of the record in this case, but not spread at large upon the journal of the court, as of this term this — day of —, 18—.

Whittaker's Civil Code, Sec. 5302 and notes.

No. 935.

Entry of Allowance of Bill of Exceptions—Another Form.

[*Caption.*]

This day came the defendant and presented its bill of exceptions in this case and moved the court to sign, seal and allow the same, and order the same to be placed on file and make it a part of the record in this case; and the court, upon due consideration thereof, find that the said bill of exceptions is a true bill of all the exceptions taken upon said trial, and to the overruling of the motion for a new trial and the rendition of said judgment; and the court further finds that the said bill of exceptions was prepared within the time allowed, and submitted to the opposite counsel for their examination, and is now presented to the court within the time allowed for that purpose, and the same is therefore signed, sealed, allowed by the court, and ordered to be placed on file and made part of the record in this case.

R. S. Sec. 5302.

DISMISSAL OF ACTIONS.

See also PARTIES.

(*R. S. Secs. 5313, 5314.*)

No. 936.

Dismissal for failure to give Security for Costs.

[*Caption.*]

Upon motion of defendant, and it being made to appear to the court that the plaintiff herein has failed to comply with the order heretofore made herein requiring him to give security for costs, it is ordered that this cause be dismissed at his costs.

No. 937.

Dismissal for Want of Prosecution at cost of Plaintiff.

[Caption.]

This day this cause came on for trial, the same having been regularly assigned for trial, and plaintiff being in default and failing to appear, either in person or by attorney, the case was called, and the court thereupon dismisses the same at his costs, for want of prosecution.

R. S. Sec. 5313. This may be modified to meet grounds in 5313, 5314.

No. 938.

Reinstatement of Cause.

[Caption.]

On motion of —, and by consent of the plaintiff herein, this cause is by order of the court reinstated and restored to the docket of this court.

JUDGMENTS IN GENERAL—COMMON FORMS.

No. 939.

Entry of Ordinary Finding for Plaintiff upon Ordinary Indebtedness
—Jury Waived.

[Caption.]

This day this cause came on to be heard upon the pleadings, evidence, and arguments of counsel, a jury being waived by the parties, and was submitted to the court. On consideration whereof the court finds for the plaintiff, and that the defendant is indebted to plaintiff upon the account [note, etc.] set forth in plaintiff's petition in the sum of \$—.

It is therefore ordered and adjudged by the court that the plaintiff recover from the defendant the said sum of \$—, together with his costs herein, taxed at \$—.

No. 940.**Judgment for Defendant—Common Form—Without Jury.**

[*Caption.*]

This cause coming on for hearing upon the pleadings and evidence and arguments of counsel (a jury herein having been waived by the parties), and was submitted to the court. On consideration whereof, and the court being fully advised in the premises, finds for the defendant; that there is nothing due plaintiff from the defendant upon the claim set forth in plaintiff's petition.*

It is therefore ordered and adjudged by the court that the said defendant go hence without day and recover the costs herein by him expended, taxed at \$——.

No. 941.**Finding and Judgment for Defendant on Counter-claim.**

[*Caption.*]

[*From *, ante No. 940, proceed.*]

And this cause coming on further to be heard upon the answer and cross-petition of the defendant, and the court being fully advised in the premises finds that there is due defendant upon his counter-claim in his said answer set forth from said plaintiff the sum of \$——.

It is therefore ordered and adjudged by the court that defendant recover from plaintiff the said sum of \$——, together with his costs herein, taxed at \$——.

No. 942.**Finding and Judgment for Plaintiff, and also for Defendant on Counter-claim or Set-off.**

[*Caption.*]

This day this cause came on for hearing upon the petition, the answer and cross petition of the defendant and the reply of plaintiff, and the parties herein waving a jury the same was submitted to the court without the intervention of a jury. And the court being fully advised in the premises finds that there is due plaintiff from the defendant upon the cause of action in his petition set forth the sum of \$——; and that

there is due defendant from plaintiff upon the counter-claim [*or*, set-off] in his answer and cross petition set forth the sum of \$——.

It is therefore by the court ordered and adjudged that the plaintiff recover from the defendant the sum of \$——, less the sum of \$——, found due the said defendant upon his counter-claim, amounting to the sum of \$——, together with his costs herein expended, to be taxed.

No. 943.

Judgment upon Joint Obligation.

[*Caption.*]

This day this cause came on to be heard (upon the motion for a new trial) [*as in ante No. 940*] [*or*, upon the pleadings and evidence, a jury being waived by the parties, and was submitted to the court. On consideration whereof] and the court being fully advised in the premises, finds that each and all the defendants are properly before the court; that the note set forth in the petition is a joint obligation upon which all of the defendants are jointly liable, and that there is due plaintiff jointly from all of the defendants herein the sum of \$——.

It is therefore ordered and adjudged by the court that the plaintiff do recover jointly from all of said defendants the sum of \$——, together with his costs herein expended.

NOTE.—R. S. Secs. 5311 and 5312, authorizing judgment against one or more of several defendants, and allowing the action to proceed against the others *whenever* a several judgment is *proper*, apply of course only to cases where the claim is several and several judgment may be rendered. *Bank v. Walters*, 1 O. S. 201; *Mason v. Alexander*, 44 O. S. 318; *Kilbourne v. Fury*, 26 O. S. 153; *Aucker v. Adams*, 23 O. S. 543. It follows that where the obligation is strictly joint, the judgment must be a joint one against all. *Aucker v. Adams*, 23 O. S. 543; *Voss v. Loomis*, 1 O. C. C. 203; *Carr v. Beckett*, 1 O. C. C. 72; *Black on Judgments*, Sec. 210; *Freeman on Judgments*, Sec. 43.

No. 944.

Entry sustaining Demurrer to Answer—With finding for Plaintiff upon Petition and Evidence.

[*Caption.*]

This cause came on to be heard on the demurrer of plaintiff to the answer of defendants, and was argued by counsel. On consideration whereof the court finds said demurrer well taken, and sustains the same. It is therefore considered and

adjudged that said demurrer be and the same is hereby sustained, and the defendants not desiring to amend their said answer, or to further or otherwise plead in this action, and this cause coming on further to be heard on the petition and evidence, the court find there is due plaintiff from the defendants on the two causes of action in the petition stated the sum of \$——, principal debt, and \$——, interest to the — day of ——, A. D. 18——, in all, \$——. It is therefore considered and adjudged by the court that the plaintiff, D. P., recover of the defendants, H. H. S., J. S. B., J. D. M., and H. S., the said sum of \$——, and his costs herein expended, taxed at \$——, and execution is awarded for said judgment and costs.

To which judgment and finding on said demurrer the defendants except. And they also except to the judgment of the court in rendering judgment for plaintiff in this action.

No. 945.

Judgment non obstante Veredicto.

[*Caption.*]

This day came the parties, and the jury having heretofore returned a verdict for the defendant, the plaintiff moves the court for judgment in his favor on the pleadings, notwithstanding said verdict. And the court being fully advised in the premises sustains said motion, to which the defendant excepts; and having heard the arguments of counsel upon the assessment of damages now assess the same at —— dollars.

It is therefore considered and adjudged by the court that the plaintiff recover of the defendant —— dollars, notwithstanding the verdict of the jury, together with his costs, taxed at \$——.

No. 946.

Judgment upon the Pleadings.

[*Caption.*]

This day this cause came on to be heard upon the pleadings, and the motion of the defendant for judgment thereon, was argued by counsel and submitted to the court. On consideration whereof, and the court being fully advised in the premises, finds that plaintiff is entitled to judgment upon the

pleading; that [*then make such finding as may be warranted by the pleadings.*]

It is therefore considered, ordered and adjudged by the court that the plaintiff recover from the defendant, etc.

R. S. Sec. 5328.

No. 947.

Contract held Valid.

[*Caption.*]

This cause came on to be heard upon the petition and answer and the exhibits attached to said pleadings and made a part thereof, and was argued by counsel and submitted to the court. On consideration whereof the court find that the contract set forth in the petition, a copy of which is thereto attached, is a legal and valid and binding contract, and that the plaintiff is entitled thereunder to the payment of his claim as set forth in his petition.

It is therefore ordered, adjudged and decreed by the court that the plaintiff recover upon his said claim the sum of \$——, together with his costs herein expended, taxed at \$——, and that the order of the board of county commissioners rejecting and dismissing said claim and annulling said contract be and the same is hereby reversed, vacated and held for naught.

DEFAULT JUDGMENTS.

(R. S. Sec. 5320.)

No. 948.

Entry Appointing Referee, or Master, to Assess Damages.

[*Caption.*]

This cause coming on to be heard upon the pleadings, and it appearing that the defendant E. F. has been duly and legally served with process, and that he is in default for answer or demurrer, it is therefore considered by the court that the allegations in plaintiff's petition contained are con-

fessed by said defendant to be true, and the court so accordingly finds.*

And the court deeming it necessary, orders and adjudges that said cause be referred to A. D., a master commissioner (*or*, as referee), who is hereby directed, authorized and empowered to hear the proof which may be adduced by plaintiff touching the amount of damages which he may have sustained by reason of the facts alleged in plaintiff's petition, and to ascertain and assess the said damages so as aforesaid sustained by him, and report the same to this court without delay.

R. S. Sec. 5320.

No. 949.

Entry upon Filing of Master's Report and Approval of same.

[*Caption.*]

This day came A. D., heretofore appointed master commissioner to ascertain and assess the amount of the damages which the plaintiff may have sustained by reason of the facts in his said petition alleged, and filed his report herein. And there being no exceptions or objections filed to said report, and the court having carefully examined the same, and finding it to be in all respects regular and correct, does therefore approve the same, and the amount so assessed by said master, to wit, the sum of \$——, the court orders shall stand as the amount which the court finds to have been the damages sustained by the plaintiff.

It is therefore ordered that the plaintiff recover from the defendant, etc.

No. 950.

Entry referring Assessment of Damages to Jury.

[*Caption.*]

[*Proceeding from * in ante No. 948.*] And the court deeming it necessary, orders that the assessment of the damages (*or*, the taking an account of the fact, etc.), be referred to a jury to ascertain and assess the same.

And thereupon came the following named jurors, [*name them*], who were duly impaneled and sworn according to law, and said jury having heard the evidence, retired to their room for deliberation. And in due time the jury came into court and returned the following verdict [*copy verdict*].

It is therefore considered, etc. [*usual judgment*].

No. 951.

Judgment by Default—Ordinary Form.

[*Caption.*]

This day this cause came on to be heard upon the petition of the plaintiff, and thereupon it appearing to the court that said defendant having been duly served with summons herein, is in default for answer or demurrer to the petition of said plaintiff, it is considered by the court that the allegations of said petition are confessed by said defendant to be true, and that said defendant * is indebted to plaintiff as in said petition alleged, and that there is now due said plaintiff from said defendant the sum of \$——, with interest from ———.

It is therefore considered by the court that the said plaintiff recover from the defendant the sum of \$——, and costs herein expended, taxed at \$——.

R. S. Sec. 5320.

No. 952.

Default as against one Defendant.

[*Caption.*]

This day this cause coming on for hearing on the petition, amendment thereto and the answer of defendant J. W. and the evidence, the defendants N. W. and F. L. being in default for answer and demurrer, and by consent of the plaintiff and defendant J. W., on consideration thereof the court finds on the issues joined between the plaintiff and defendant J. W., for said plaintiff, and finds the allegations of the petition confessed as against the defendants N. W. and F. L., and that said defendant J. W. is indebted to the plaintiff in the sum of \$——, with interest thereon from ———, 18—.

It is therefore considered that the said D. H., plaintiff, recover from the said J. W. the said sum of \$—— and his costs herein expended.

R. S. Sec. 5320.

No. 953.

Entry when Action is for Damages.

[Caption.]

[*Proceeding from * in ante No. 951*] is entitled to recover damages from the defendant, which the court finds after having heard the proof adduced with respect thereto to be the sum of \$——.

It is therefore considered, ordered and adjudged that the plaintiff recover from the defendant the sum of \$——, together with his costs, for which execution is awarded.

R. S. Sec. 5320.

REVIVOR OF JUDGMENT.

(R. S. Secs. 5366—5371.)

No. 954.

Revivor of Judgment on Petition.

[Caption.]

This cause came on to be heard upon the petition to revive a judgment heretofore rendered in this cause in the Court of Common Pleas, — county, Ohio, wherein the said L. M. was plaintiff and the said D. B. was defendant. And it appearing to the court that the said defendant has been duly served with a summons herein, and that no cause has been shown why said judgment should not be revived, it is therefore considered, ordered and adjudged by the court that the said judgment heretofore rendered by this court at the — term, 18—, in favor of this plaintiff and against this defendant for the sum of \$——, with interest from the — day of —, 18—, and \$——, his costs of suit against the said defendant, D. B., do stand revived. It is also further considered that the plaintiff recover from the defendant, D. B., his costs herein expended since the — day of —, for all of which execution is awarded.

R. S. Secs. 5367—5380. Kinkead's Code Pleading, Sec. 1112.

No. 955.**Entry of conditional Order of Revivor.**

[*Caption.*]

This day came A. C. and made representations to the court that the judgment heretofore rendered in this cause by this court, on the — day of —, 18—, against the said defendant for the sum of \$—, with interest and costs, is still due and unpaid, and has become dormant, and upon motion of the said plaintiff it is ordered that unless good cause be shown by said defendant why said judgment should not be revived within — days after this order shall have been served upon him, said judgment shall stand revived against him and be in full force.

No. 956.**Entry of Revivor when conditional Order has been Served.**

[*Caption.*]

This day this cause came on for further hearing upon the motion filed herein by plaintiff for an order of court reviving the judgment heretofore entered in this cause. And it appearing to the court that the conditional order of revivor heretofore made herein has been duly and properly served upon the defendant, and said defendant not having shown any good and sufficient reason why said judgment should not stand revived against him, it is by the court considered, ordered and adjudged that the said judgment heretofore rendered herein, to wit, on the — day of —, for the sum of \$—, against said defendant, and \$—, his costs, be and the same is hereby revived against said defendant, and execution is awarded accordingly.

No. 957.**Entry of Revivor against Personal Representative of deceased Defendant.**

[*Caption.*]

This day this cause came on to be heard upon the petition heretofore filed herein by plaintiff for revivor of the judgment herein for the sum of \$— and costs. And it

appearing to the court that said judgment is still unsatisfied but dormant, and that since its rendition the said defendant has departed this life, and that E. D. is the duly appointed and qualified administrator of the estate of the said E. J., deceased, that said E. D. has been duly and legally served with notice of these proceedings, and no cause having been shown by said administrator why said judgment should not stand revived against him as such administrator, it is ordered that said E. D., as such administrator, is hereby made a party to said judgment, and said judgment is revived against him.

R. S. Sec. 5369. This may be made by conditional order, following the other entries.

No. 958.

Entry Reviving Decree for Alimony.

[*Caption.*]

This case came on for hearing to the court upon the demurrer of the plaintiff to the second and third grounds of defense in the answer, and having been argued by counsel, and the court being fully advised in the premises, the said demurrer is sustained, to which ruling of the court the answering defendants except. And this cause coming on for trial upon the issues joined between the parties, and neither party demanding a jury, a jury is by the parties, and by the guardian *ad litem* for the minor defendants, orally in open court waived, and this cause is submitted to the court for a new trial upon the pleadings and testimony. And the court having heard the evidence, and being fully advised in the premises, finds that all the allegations of fact contained in the petition are true. It is therefore considered, adjudged and decreed by the court that the decree for alimony mentioned in the petition be revived as against each and all the parties defendant, the real estate described therein, as to all installments thereof, whether matured or not, except as such thereof as have as alleged in the petition been satisfied by payment. And the court further finds that there is due and unpaid, on the various matured installments of said decree, including that which matured —, 18—, with interest from the time each installment severally matured up to the — day of —, 18—, the sum of — dollars (\$—). It is therefore further adjudged and decreed by the court that unless said sum of \$—, with interest from —, 18—, and the costs of this action be paid within ten days after this term, the sheriff of this county shall proceed to advertise and sell the real estate

described in the petition according to law, free from all liens described in the petition, and out of the proceeds pay, first, the costs in this case, the said sum of \$—, with interest, and that the remainder of said proceeds he bring into court, to abide its further order, and this cause is continued, to which judgment and decree said answering defendants except.

ENFORCEMENT OF JUDGMENT—EXECUTION.

(*R. S. Secs. 5372—5463.*)

No. 959.

Entry Authorizing Sheriff to have Personal Property Appraised and Sold at Private Sale.

[*Caption.*]

This day this cause came on to be heard upon the application of —, plaintiff (*or*, defendant) herein, for an order authorizing the sheriff to sell the goods and chattels of the defendant held by him by virtue of a levy made under an execution issued herein at private sale. And it appearing to the court that due notice has been given the defendant (*or*, plaintiff) of the filing and time set for the hearing of this application, and that it will be for the best interests of the parties hereto, and for good cause shown, it is ordered that the sheriff proceed to have said personal property so held by him under said execution appraised by three disinterested persons of the county, and that he shall thereupon proceed to sell said property at private sale for cash, at not less than two thirds of the appraised value thereof, and that he proceed to execute this order within — days from the date hereof.

R. S. Sec. 5387.

No. 960.

Entry ordering Sheriff to sell Stock of Goods Levied upon at Private Sale—Also to collect Book Accounts—Another Form.

[*Caption.*]

This day came the plaintiff and defendants, and it appearing to the court that it would be to the best interest of the defendants to sell the stock of goods and chattels levied upon by the sheriff upon execution herein at private sale rather than selling at public auction according to the command of said execution, and the defendants now coming and requesting the court to direct the said sheriff to sell the property so levied upon at private sale, it is here ordered by the court, with the consent of the plaintiff, that the said sheriff proceed to sell the goods and chattels so levied upon as aforesaid, except the book of accounts, at private sale for not less than the cost thereof, and that he return the proceedings thereof into court with the return of said execution. Said sheriff is also directed and authorized to collect as far as possible the accounts upon the books of account so levied while disposing of said stock of goods.

No. 961.

Entry upon Motion to set aside Appraisement of Real Estate made under R. S. Secs. 5389, 5390.

[*Caption.*]

This day this cause came on to be heard upon the motion of — to set aside the appraisement made of the real estate of defendant, levied upon by the sheriff under the execution issued herein, and deposited herein (*). On consideration whereof the court finds that said motion is well taken, and does therefore order and adjudge that said appraisement be and the same is hereby set aside and held for naught; it is further ordered that the sheriff cause a new appraisement to be made of said premises.

R. S. Secs. 5389, 5390.

No. 962.

Entry overruling Motion to set aside Appraisement.

[*Caption.*]

[*Continuing from * in ante No. 961.*]

On consideration thereof the court overrules said motion.

No. 963.

Publication of Notice in German Paper Dispensed with.

[*Caption.*]

Upon motion of plaintiff herein, and for good cause, it is ordered that publication of the notice of execution sale herein to be made be and the same is hereby dispensed with.

R. S. Sec. 5394.

No. 964.

Entry ordering Publication of Notice in Bohemian Paper.

[*Caption.*]

On motion of plaintiff herein, and the court deeming it for the best interests of the defendant, orders that, in addition to the usual publication, notice of the execution sale to be made herein be made in the [*name of paper*], according to law.

R. S. Sec. 5394.

No. 965.

Entry confirming Execution Sale.

[*Caption.*]

This cause coming on to be heard upon the return of the sheriff of the writ of execution heretofore issued herein, and the motion of the plaintiff to confirm the sale made by said sheriff thereunder. On consideration whereof, the court, upon a careful examination of the proceedings of said sheriff under said writ, finds that the same are regular and correct, and that said sale so made by him has been in all respects in conformity to law (and the orders of this court).

It is therefore considered, ordered and adjudged by the court that said sale be and the same is hereby approved and confirmed; that said sheriff make and deliver to the purchaser, A. B., a good and sufficient deed for the lands so sold to him; (that a writ of possession be awarded placing said purchaser in possession of said premises;) and that he be subrogated to all the right of any lienholder whose claim may be satisfied from the proceeds of said sale.

It is further ordered that said sheriff, out of the funds in his hands arising from said sale, pay: 1st. The taxes due thereon; 2d. The costs herein taxed; 3d. To the plaintiff the sum of \$——, the amount of his judgment herein, etc.

R. S. Sec. 5398. As to subrogation, Sec. 5410. Whittaker's Civil Code, pp. 293, 294, notes.

No. 966.

Entry ordering Master Commissioner to Convey.

[*Caption.*]

Upon motion of plaintiff herein, and it appearing to the court that by an (order) (*or*, judgment) heretofore made herein, the defendant was ordered to convey the real estate in plaintiff's petition described to plaintiff herein, but that said defendant has neglected and failed to comply with said order, it is ordered that G. O. (a master commissioner of this court) (*or*, who is hereby appointed as special master for this purpose), be and he is hereby directed and empowered to convey said premises to said plaintiff according to law.

NOTE.—This entry is authorized by R. S. Sec. 5399, but a decree in a chancery case may be so framed as to operate as a conveyance if the party fails to make the deed.

No. 967.

Entry ordering Sale to be made on the Premises.

[*Caption.*]

Upon motion of plaintiff (*or*, defendant), and for good cause shown, it is ordered by the court that the sheriff proceed to advertise and sell the premises under the writ of execution issued herein upon the premises, according to law.

R. S. Sec. 5404.

No. 968.

Entry ordering Successor of Sheriff to make Deed.

[Caption.]

Upon motion, and it appearing to the court that the term of service of J. R., the sheriff who made the sale under the execution hereinbefore issued has expired, and that the sale so made by said J. R. to C. D. was fairly and legally made, and that W. Y. is the successor in office of said J. R., it is therefore ordered by the court that the clerk of this court issue a certificate setting forth these facts, according to law, and deliver the same to said W. Y., and that said W. Y., upon payment of the purchase money (or upon proof of payment of purchase money), execute and deliver to C. D., purchaser aforesaid, a good and sufficient deed for the premises so sold to him according to law.

R. S. Sec. 5407.

No. 969.

**Entry subrogating Purchaser to right of Creditor against Debtor
—When Title of Purchaser imperfect.**

[Caption.]

This cause coming on to be heard upon the motion of —, the purchaser of the premises herein sold under execution, was argued by counsel and submitted to the court. On consideration thereof, and the court being fully advised, finds that said motion is well taken, and that the title to the premises so purchased by him is imperfect and invalid by reason [*state how defect arises*], therefore sustains the said motion. It is therefore considered and ordered by the court that the said — be and he is hereby subrogated to the rights of —, the said —, plaintiff herein, as against the said —, judgment debtor herein, to the extent of the money so paid by said —, and applied to the benefit of the said judgment debtor, —, and that the said — have a lien on the premises sold herein, as against all persons, except *bona fide* purchasers without notice, and that the said plaintiff shall not be liable to refund the said purchase money so received by him herein by reason of the premises and of such irregularity or defect herein found.

R. S. Sec. 5410.

No. 970.**Entry vacating Satisfaction of Judgment under R. S. Sec. 5412.**

[*Caption.*]

Upon motion of —, and due notice thereof, and it having been satisfactorily made to appear to the court that the property levied upon under an execution herein and sold, was not subject to said execution, and that said property was the property of —, and that plaintiff has paid to said — upon recovery had by him against plaintiff the sum of \$—, it is ordered that the satisfaction of the judgment herein be and the same is hereby set aside and held for naught, and that the former judgment be and is hereby restored and revived.

See also R. S. Sec. 5413.

No. 971.**Entry ordering New Appraisement for Sale on Execution.**

[*Caption.*]

This day this cause came on to be heard upon the motion of plaintiff herein to set aside the appraisement made herein under an execution and for a new appraisement. And it appearing that said premises have been twice offered under said former appraisement, and remain unsold, it is ordered that said former appraisement be and the same is hereby set aside, and the sheriff is hereby directed and empowered to have a new appraisement to be made of said premises, and that he proceed to advertise and sell said premises under such new appraisement according to law.

R. S. Sec. 5416.

No. 972.**Entry directing the Amount at which Premises to be Sold.**

[*Caption.*]

Upon motion of plaintiff, and it appearing to the court that the premises herein have been appraised three times, and that the same have been twice advertised and offered for sale under such third appraisement, and that the same remain unsold for want of bidders, it is ordered that the sheriff pro-

ceed to advertise and sell said premises for the sum of \$——, upon the following terms, to wit: [*state terms.*]

R. S. Sec. 5416.

No. 973.

Entry upon ordering Re-appraisement and Re-assignment of Homestead.

[*Caption.*]

This day this cause came on to be heard upon the complaint filed herein by ——, as to the appraisement and assignment of homestead, made by the sheriff under the execution issued herein, and it appearing to the court that [*state reasons for making order*]. It is therefore ordered that the appraisement and assignment heretofore made herein be set aside, and that the said sheriff cause a re-appraisement and re-assignment of the homestead to the said —— according to law, and return his proceedings hereunder.

R. S. Sec. 5438.

No. 974.

Entry authorizing Execution against the Person.

[*Caption.*]

This cause coming on to be heard upon the motion of ——, and it appearing that the judgment heretofore rendered herein for the sum of \$—— against said defendant remains unsatisfied, and that [*here state existence of any of the grounds under R. S. Sec. 5448*]; it is therefore ordered that an execution be allowed to issue against the person of the said defendant according to law.

R. S. Secs. 5448, 5449.

No. 975.

Entry Discharging Debtor.

[*Caption.*]

It appearing from evidence adduced that the defendant herein is unable to pay the judgment [*or, is unable to endure the imprisonment*], it is ordered that said —— be discharged and released from further imprisonment under the execution herein.

R. S. Sec. 5456.

No. 976.

Entry Discharging Debtor upon Motion

[*Caption.*]

Upon motion and for satisfactory reasons it is ordered that the defendant be and he is hereby released and discharged from further imprisonment herein, under the execution issued herein.

R. S. Sec. 5461.

No. 977.

Motion to Grant Stay of Execution.

[*Caption.*]

This cause came on this day to be heard upon the motion of the defendant to grant a stay of execution of the judgment rendered herein. On consideration whereof the court grants said motion, and it is hereby ordered that execution on said judgment be and the same is hereby stayed for a period of — days, on consideration that the defendant within — days from the making of this order give bond in the sum of \$—, to the satisfaction of the clerk of this court, properly conditioned according to law.

PROCEEDINGS IN AID OF EXECUTION.

(*R. S. Secs. 5472—5490.*)

A proceeding in Aid of Execution is in no sense an action. The judge sits not as a court, but merely as a statutory tribunal of limited jurisdiction. The judge has no equity powers, no power to call a jury, and can neither make new parties nor settle controversies between the judgment debtor and third parties. The moment a dispute as to the property which the debtor has with a third person arises, the judge loses his jurisdiction over the subject-matter. (1 W. L. M. 87, 143; 11 O. S. 323.) It will be noticed that all the provisions speak of the judge excepting one.

No. 978.

Application for an order for Examination of Judgment Debtor in case in which Judgment was rendered.

A. B.,		} Application for Examination of Defendant.
	Plaintiff,	
	v.	
C. D.,		}
	Defendant.	

Now comes the plaintiff herein and represents to the court that on the — day of —, 18—, he caused an execution to be issued in the above-entitled cause to the sheriff of this county, which execution was on the — day of —, 18—, returned by said sheriff, indorsed "no goods or chattels or lands found whereon to levy"; that said execution remains wholly unsatisfied.

Plaintiff therefore asks that an order may issue requiring the said C. D. to appear and answer concerning his property, at such time and place as may be named.

———, Attorney.

(*The usual verification.*)

Examination of debtor after return of execution. Whittaker's Civil Code, Sec. 5472. Before return of execution. *Id.*, Sec. 5473. Kinkead's Code Pleading, Sec. 1021.

No. 979.

Application for an Examination of Judgment Debtor in Independent Proceeding.

A. B.,		} Application for Examination of Debtor.
	Plaintiff,	
	v.	
C. D.,		}
	Defendant.	

Plaintiff says that on the — day of —, 18—, he recovered a judgment against the defendant in the above-entitled action for the sum of \$—, and \$—, costs, in the court of —, that he caused an execution to be issued in said cause, which was on the — day of —, 18—, returned by the sheriff of — county, Ohio, indorsed [*copy of indorsement*], that said judgment is still in full force and wholly unsatisfied.

Plaintiff says that one E. F. is indebted to said defendant [*state how*].

Plaintiff therefore asks that an order may issue requiring said defendant, C. D., and the said E. F. to appear and answer concerning the property of said defendant at such time as may be named.

———, Attorney.

(*Usual verification, or it may be in the form of motion without verification.*)

R. S. Sec. 5472; Kinkead's Code Pleading, Sec. 1021.

No. 980.

Affidavit for Order requiring Defendant to Appear and Answer concerning his Property.

[*Caption.*]

A. B. (plaintiff in foregoing action), being duly sworn, says that he recovered a judgment against the said C. D., for the sum of \$——, in the court of ——, on the —— day of ——, 18—. That on the —— day of ——, 18—, he caused an execution to be issued in said cause to the sheriff of —— county, Ohio. That on the —— day of ——, 18—, said sheriff returned said execution wholly unsatisfied, indorsed "no property of the defendant subject to execution on which to levy."

Affiant says that the said judgment debtor has the following-described property which he unjustly refuses to apply toward the satisfaction of the judgment, to wit: (*here state what the property is which is sought to be reached*).

A. B.

(*Or, where third person has property.*) That the said E. F., a resident of said county, is indebted to the said C. D. upon (*state how*), (*or, that E. F., a resident of said county, has property in his possession belonging to said defendant, C. D., to wit* [*describe it*]).

Subscribed in my presence and sworn to before me this —— day of ——, 18—.

No. 981.

Entry upon filing of Petition and Affidavit—Ordering Judgment Debtor to Appear.

[*Caption.*]

This cause coming on to be heard upon the plaintiff's petition and affidavit, and it appearing to the court that on the — day of —, 18—, plaintiff, by the consideration of the — court of — county, Ohio, recovered a judgment against defendant in the sum of \$—, and interest at — from —, and costs taxed at \$—, and that on the — day of —, 18—, plaintiff caused an execution on said judgment to be issued to the sheriff of said — county, Ohio, of which county defendant then was and now is a resident, which execution was on the — day of —, 18—, returned wholly unsatisfied, endorsed "No property found."

It further appearing to the court that no part of said judgment has been paid, and that said defendant probably has property which he unjustly refuses to apply toward the satisfaction of said judgment, * it is therefore ordered that an order issue requiring said C. A. to be and appear before this court on the — day of —, 18—, at — o'clock, and then and there answer under oath concerning his property.

R. S. Sec. 5473.

No. 982.

Entry Ordering Arrest.

[*Caption.*]

This day came the plaintiff and filed his application for an order requiring the defendant to appear and answer concerning his property, and it being made to appear to the satisfaction of the court by the affidavit of — that there is danger of the defendant leaving the state to avoid the examination, it is ordered that a warrant issue to the sheriff of this county requiring him to arrest the defendant and bring him before this court, that he may be examined on oath concerning his property, and to abide the further orders of this court.

When order of arrest may be made. Whittaker's Civil Code, Sec. 5474.

No. 983.

Allowance of Undertaking.

[Caption.]

This cause now being heard upon the application of the defendant concerning his property, and it appearing from such examination that there is danger of the defendant leaving the state, it is ordered that he enter into an undertaking in the sum of \$——, with surety to the approval of the clerk, conditioned that he will attend before this court from time to time as directed, and in default of entering into such undertaking at once he be committed to the jail of the county.

Whittaker's Code, Sec. 5474.

No. 984.

Entry ordering third Person to Appear.

[Caption.]

[*Proceed from * in ante No. 981*]; and it also appearing by the affidavit of the plaintiff that one E. F. is indebted to the defendant, C. D. [*or*, that E. F. has property in his possession belonging to the said defendant, C. D.], it is therefore ordered that both the defendant, C. D., and the said E. F., appear before the court and answer concerning the property of said C. D., the said E. F., concerning any indebtedness which may be owing by him to C. D. [*or*, any property which he may have belonging to said C. D.] on the —— day of ——, 18——, at — o'clock ——.

Whittaker's Civil Code, Sec. 5475.

No. 985.

Summons or Notice to be Served on Defendant.

[Caption.]

To the Sheriff of —— county: Whereas, Hon. ——, Judge of the Court of ——, of —— county, Ohio, has made the following order: [*copy of order*], you are hereby commanded to summon C. D., therein named, to be and appear before Hon. ——, Judge of the —— Court, —— county, Ohio, on the —— day of ——, 18——, to answer concerning

his property as directed in said order, and abide the further order of the court, and you will make due return of your doings in the premises.

In witness whereof, etc.

The order must be in writing and signed by the judge who makes the same, and served as a summons. Whittaker's Civil Code, Sec. 5487. This should be issued by the clerk, but the entry should bear the signature of the judge.

No. 986.

Entry appointing Referee.

[*Caption.*]

This day came the parties, the defendant, in obedience to an order heretofore issued herein, requiring him to appear and submit to an examination concerning his property (and by consent of both parties hereto), (*or*, and upon motion of plaintiff herein) it is by the court ordered that A. B. be and he is appointed as referee herein; and he is hereby required and authorized to take the evidence herein and report [the same herein without unnecessary delay] [*or*, the facts to the court without unnecessary delay], duly certified according to law. It is further ordered that the defendant appear before the said A. B., and answer such questions as may be propounded concerning his property, on the — day of —, 18—, at — o'clock —.

Referee may be appointed. R. S. Sec. 5477. Examination must be certified to the judge. R. S. Sec. 5480.

No. 987.

Entry applying Property held by Debtor.

[*Caption.*]

This day this cause came on to be heard, the defendant herein having been examined concerning his property, and it appearing to the satisfaction of the court, and the court does find that the defendant has the following property, which he conceals, not exempt from execution, to wit: [*description of property.*]

It is therefore ordered that said defendant deliver or cause said property to be delivered to the sheriff of this county, and that said sheriff proceed to sell the same according to law and apply the proceeds arising therefrom to the payment of the judgment of the plaintiff herein according to law.

R. S. Sec. 5483.

No. 988.

Entry applying Property or Funds held by third Persons.

[Caption.]

This day this cause came on to be heard upon the application heretofore filed herein for an examination of the defendant herein, concerning his property, and of E. F., concerning an indebtedness due from him to the said C. D., and it appearing to the satisfaction of the court from the examination so had herein under said application that the said E. F. is indebted to the said C. D. in the sum of \$—— [*it might be stated in brief how indebtedness arises*]; that the said C. D. is not entitled to hold said sum as an exemption under the laws of Ohio, it is therefore ordered that the said E. F. pay said sum of \$—— to the clerk of this court, and that said clerk apply and pay the same upon the judgment heretofore rendered and set forth in the application herein, after first paying the costs herein.

R. S. Sec. 5483. The mode of applying property is not pointed out by the code, but it must be by analogy, as to claims of the debtor against third persons, to the remedies to which the debtor himself might resort. *Edgerton v. Hanna*, 11 O. S. 323. Disputes between the debtor and third persons can not be considered or settled by the court. *Id.* The judge has no power to apply money or property of the judgment debtor to a judgment, if there is *prima facie* evidence before him of an adverse claim to such money or property; nor can he apply money due the judgment debtor, except so far as the person owing it admits on his examination the amount of his indebtedness. *Welch v. R. R. Co.*, 1 W. L. M., 87, 143.

No. 989.

Entry appointing Receiver to take charge of Rights and Credits.

[Caption.]

This day this cause came on for hearing upon the application heretofore filed herein, and the testimony heretofore taken herein in the examination had herein, and it being made to satisfactorily appear therefrom that the defendant has certain rights and credits not subject to the ordinary process upon execution, to wit: a certain mortgage for the sum of \$——, due to him from J. H., with interest; also certain stock, 20 shares of the capital stock of The —— Company. And the court further finds that said defendant is not entitled to hold said rights and credits exempt under the law. It is therefore ordered that G. H. be and he is hereby appointed

receiver herein, and the said defendant is ordered to deliver said mortgage and stock to said G. H. as such receiver; and the said receiver is hereby authorized to collect, sell or dispose of said rights and credits, and make the necessary transfers thereof for that purpose, and apply the proceeds derived therefrom to the payment of the judgment of the plaintiff herein, and make due report to the court of his proceedings hereunder. It is further ordered that said G. H. enter into a bond as such receiver, conditioned according to law in the sum of \$——.

R. S. Sec. 5587. When claims are to be collected, the appointment of a receiver is the proper course. *Edgerton v. Hanna*, 11 O. S. 323.

No. 990.

Entry subjecting Interest in Real Estate.

[*Caption.*]

This day this cause coming on further to be heard upon the application of the plaintiff for an examination of the defendant concerning his property, and the court having heard all the testimony adduced with respect thereto, does find that said defendant has a certain equitable interest, to wit: [*set forth interest briefly*] in the following described real estate situate in this county, of which the following is a correct description, to wit: [*describe property*]. And it appearing to the court that the interest of said defendant can be ascertained without controversy with other persons having an interest therein, it is therefore ordered that the sheriff proceed according to law to appraise, advertise and sell said interest of said defendant in premises as upon execution, and bring the proceeds into court for further order. On motion, and for good cause shown, publication in German newspaper is hereby dispensed with.

R. S. Sec. 5186. The subsequent entries can be moulded from those under foreclosure.

No. 991.

Entry where Examination fails to Disclose any Property.

[*Caption.*]

This day this cause came on to be heard upon the application for the examination of the defendant herein concerning his property, and the court having heard all the evidence

adduced, and said examination having failed to disclose any property in the hands or under the control of the said defendant which was applicable to the payment of the judgment, it is ordered by the court that the proceedings be dismissed at the cost of plaintiff.

ARBITRATION AND AWARD.

No. 992.

Form of Award of Arbitrators.

[*Caption.*]

Whereas the above-named plaintiff and above-named defendants have submitted the question of damages and all matters in controversy in the above-entitled action to the award of A. C. A., H. E. B. and A. H. J., and said submission was by said parties duly made a rule of the Court of Common Pleas of — County, Ohio, and thereupon said above cause was by said court duly referred to the award and determination of the said A. C. A., H. E. B. and A. H. J. Now therefore be it known that we, the said A. C. A., H. E. B. and A. H. J., the arbitrators aforesaid, having taken upon us the burden of the said reference, do hold said arbitration between the said parties on the — day of —, 18—, and by adjournment from time to time thereunder, as agreed upon said parties and to suit their convenience, the parties being present and duly represented by counsel at each and all our meetings to hear and take evidence, said meetings for the purpose of hearing and taking evidence being held at the office of A. H. J. in the — building in the city of —, Ohio. And having heard, examined and considered the allegations, witnesses and evidence, submitted to us, we do hereby find and award that the amount of damages due from the defendant, the city of C., to the said above-named plaintiffs, R. C. S. and W. S. P., is \$—, and we hereby award to said plaintiff from the defendant the said sum of \$—, and as to the payments of the costs of this arbitration we award and determine that said defendant should pay the same.

Signed and published by the said A. C. A., H. E. B. and A. H. J.

Dated this — of —, 18—.

No. 993.

Arbitration—Judgment on Award of Arbitrators.

[Caption.]

This day came the parties hereto by their counsel and presented to the court the arbitration and award duly returned and filed herein according to the former order of this court, the same having been duly made and returned and filed according to the former orders of this court, and no (legal) exceptions having been taken thereto, and it appearing that an arbitration bond was duly executed according to law, and that the said — was furnished with a true copy of said award within the time required by law; * and it appearing therefrom that the amount awarded to the plaintiff is \$—, of date of the — day of —, 18—, and the plaintiff moving for judgment on said arbitration and award, it is therefore considered, ordered and adjudged by the court that the said plaintiff recover from the said defendant the said sum of \$—, so awarded to them as aforesaid to this date, to wit: \$—, making in all to this date the sum of \$—, for which execution is hereby ordered.

R. S. Secs. 5609-5612.

No. 994.

Entry of Judgment upon Award other than for Money.

[Caption.]

(*Proceeding from * in ante No. 993.*) And it appearing from said award that the said — is directed and required to [*here state the thing which is required*].

And it appearing that the said — has wholly failed to comply with the provisions of said award, and has wholly failed and neglected to [*state what he has failed to do*].

It is therefore ordered and adjudged that the said — [*state what is required of him in the award*], within — days from the date of this entry, or that he appear on the — day of —, 18—, before this court and make known his reasons why he does not so comply with the terms of said award

R. S. Sec. 5610.

No. 995.

Entry setting Award aside

[*Caption.*]

This cause came on to be heard upon the motion of — to set aside the award made herein by E. B., F. S. and D. A., and filed herein, according to law, and the exceptions filed thereto by said —, and the evidence and arguments of counsel, and was submitted to the court.

On consideration whereof, and the court being fully advised in the premises, finds that said exceptions are well taken and does therefore sustain the same. It is therefore ordered, adjudged and decreed that the said award be and the same is hereby set aside and held for naught, to which the said — excepts. And said cause is retained for trial in this court according to law.

R. S. Sec. 5611.

ASSESSMENTS.

No. 996.

Entry of Judgment in Suit for Enforcement of Assessment.

[*Caption.*]

This day this cause came on to be heard upon the pleadings and evidence (a trial by jury having been waived by the parties), and was argued by counsel.

On consideration whereof, and the court being fully advised, finds that the allegations in the petition are true, and that the assessment set forth in plaintiff's petition has been in all respects regularly and legally made, and that the same is a valid lien upon the property of defendant described in the petition, and that there is due plaintiff from said defendant upon said assessments the sum of — dollars.

It is therefore ordered and adjudged by the court that the plaintiff recover from said defendant the said sum of \$—, and that unless said defendant pay to the clerk of this court said sum of \$— within — days from the date hereof, that said lien of said assessments be foreclosed and said premises be sold, and the proceeds derived therefrom be ap-

plied to the payment of said assessment, and that an order of sale issue to the sheriff of this county directing him to advertise and sell said premises according to law.

R. S. Secs. 2286, 2287.

No. 997.

Allowance of Temporary Injunction on Collection of Street Assessments.

[*Caption.*]

This day this cause came on to be heard upon the petition and application of plaintiffs for a temporary restraining order in said petition asked, upon consideration whereof, and being fully advised in the premises, the court finds that the plaintiffs are entitled to said temporary order.

It is therefore ordered, adjudged and decreed that the defendants, the city of C——, O. E. D. B., treasurer of said county, W. H., auditor of said county, be and each of them are hereby enjoined until the further order of this court, from collecting or in anywise attempting to collect from plaintiff or from his said lots of real estate in the petition described, the special assessments levied by the council of said city for the improvement of said — street.

No. 998.

Assessment—Minors Set Aside for want of Service upon Minors.

[*Caption.*]

This day came the parties, and this cause came on to be heard on the petition and answers of defendants, exhibits and testimony and evidence adduced, and was submitted to the court, and the court being fully advised in the premises finds that written notice of the resolution declaring it necessary to make said improvement was served upon the duly appointed and qualified guardian of said minor children and that no other notice of the passage of said resolution was ever served upon said minor children, owners of said real estate, and the court finds that said notice is insufficient in law, and that the said pretended assessment is invalid, illegal, void, of no force or effect in law and no lien upon said premises described in the petition.

It is therefore ordered, adjudged and decreed by the court that the petition be dismissed as to the defendants and that said defendants recover their respective costs herein, taxed at \$——.

No. 999.

Entry declaring that certain Assessments against certain Real Estate are Valid—Where Grantee had assumed Payment in Deed.

[*Caption.*]

This cause came on to be heard upon the petition, the answer and cross petition of J. C., and the answer of the city of C., and S. A. K., treasurer of — county, and the evidence and the cause having been submitted to the court, and upon consideration thereof the court finds that the city of C. caused the roadway of — avenue to be improved as in the petition averred, and that the city council, on the — day of —, 18—, caused an assessment of \$— to be levied upon each front foot of the several lots and lands on either side of said — avenue; that at the time of the levy of said assessment the plaintiff, D. C., was the owner of lot —, of — addition to said city; that said lot is located at the — corner of — avenue and — avenue, and fronted — feet on — avenue, and had a side length of — feet along — avenue, upon which said assessment was levied as aforesaid; that prior to the bringing of this action on the — day of —, 18—, the plaintiff conveyed to the defendant, J. C., the south part of said lot, to wit: — feet front on the north side of — avenue, and — feet on the east side of said lot on the west side of — avenue; thence across said lot to the west side of the same; thence along the west side of said lot — feet to the southwest corner of said lot —; that at the time of the bringing of this action the said plaintiff was the owner of — feet on the north end of said lot, which fronts on — avenue, and that the defendant, J. C., was the owner of the remainder of said lot which fronted — feet on — avenue and — feet on — avenue.

The court further finds that the defendant, J. C., in his deed from D. C., assumed and agreed to pay as part of the consideration for the purchase of said premises all of the street assessments against said lot due and payable after —, 18—.

The court further finds that by reason of said assumption the defendant, J. C., is not entitled to any relief on his cross petition, and on the issue joined between the defendant, the city of C., the treasurer, S. A. K., and the defendant, J. C., upon his answer and cross petition, the court finds in favor of the defendant, the city of C., and S. A. K., treasurer, and upon the issue joined between the plaintiff, D. C., and the

defendants, the city of C., and S. A. K., treasurer, the court finds the — feet owned by said plaintiffs should have been assessed for said improvement with the sum of \$— and no more; that by the terms of the assessment ordinance said assessment was made payable in — annual installments.

The court further finds that the plaintiff has paid \$— annual installments and interest upon said assessments, and that there remains due upon said assessment from said plaintiff the sum of \$—, with interest at — percent per annum from —, and that said sum is payable in — annual installments of \$— each, with interest as aforesaid.

It is therefore ordered, adjudged and decreed by the court that said plaintiff shall pay to said defendant, the city of C., in full payment for the assessment levied for the improvement of said — avenue, upon that part of said lot herein found to be owned by said plaintiff — annual installments of \$— each, with interest thereon at — percent, payable annually from —, the first of which assessment was due and payable —, and by consent of parties it is ordered that said plaintiff may pay all of said installments at his option on —, and in default of such payment an order of sale may issue to the sheriff to sell said premises and apply the proceeds to the payment of said assessment.

It is further ordered, adjudged and decreed that the temporary restraining order heretofore allowed herein, hereby be and is made perpetual as to all the remainder of the assessment in excess of said sum of \$—, levied upon that part of said lot now owned by the plaintiff for the improvement of — avenue, as aforesaid, and said restraining order is hereby dissolved as to said sum of \$—, with interest as aforesaid.

It is further ordered, adjudged and decreed by the court that the temporary restraining order heretofore allowed herein against all of that part of the assessment for the improvement of said — avenue, levied and assessed against that part of the lot herein found to be owned by J. C., be and hereby is dissolved, and that the cross petition of said — be and the same is hereby dismissed.

No. 1000.

Entry Reducing Assessments and Enjoining Collection.

[*Caption.*]

This day this cause came on to be heard upon the petition of the plaintiff, the joint answers of the defendants and the

testimony, was argued by counsel and submitted to the court. On consideration whereof the court finds from the testimony that the city of C. is a city of the — grade of the — class, duly organized under the laws of Ohio; that the defendant, S. K., is the duly elected, qualified and acting county treasurer of — county, Ohio; that on the — day of — the city council of said city adopted and passed a resolution declaring it necessary to improve — avenue in said city from — street to — street, by grading and constructing thereon an asphalt stone block, etc., [*description of street*], in accordance with the plans and profile thereof made by the civil engineer of said city, and that said improvement was to be made under the provisions of an Act of the General Assembly of the State of Ohio, passed May 11th, 1886, as amended March 21, 1887, entitled "An Act to provide, etc."

The court further finds that said avenue in said city from — street to — street was improved under the provisions of said Act of May 11, 1886, as amended, by grading the roadway and laying thereon an asphalt pavement and setting a five-inch curb on each side of said roadway, and at the time and in the manner set forth in the petition of plaintiff, and that said council in order to pay for the cost and expense of making said improvement and to provide a fund for the redemption of bonds which, during the progress of said improvement had from time to time been issued and sold, levied an assessment of \$— upon each foot of real estate lying or touching on either side of said avenue so improved, without regard to the actual frontage of said lots or lands.

The court further finds that at the time of levying said assessment this plaintiff was the owner of lot No. —, of — division, in said city as the same is numbered and delineated, etc., and further finds that at the time of said improvement said lot was unfenced, vacant and unimproved.

The court further finds from the evidence that on the — day of —, and after said assessment had been made, the plaintiff sold and conveyed to one E. B. so much of said lot No. — as is embraced in the following description, to wit: [*description*].

And the court further finds from the evidence that the plaintiff is still the owner in fee simple of all of said lot —, except said part so conveyed to said E. B. as aforesaid. The court finds that said assessment was levied upon the entire side length of — avenue upon said lot No. —, and that the amount aggregate so levied upon said lot No. —, exclusive of interest, is the sum of \$—, and was made pay-

able in equal annual installments, at — percent interest, payable annually.

The court further finds from the evidence that said plaintiff should pay for — feet only of the — feet of said lot still owned by him, the total assessment of feet thereof amounting to the sum of \$—, and that all of said total assessment of \$— was made on said lot in excess of said sum of \$— is as to all that portion of said lot No. —, which is still owned by said plaintiff, and being the — feet as aforesaid, excessive, illegal and void. The court further finds that the plaintiff was entitled to pay said assessment of \$— in equal annual installments of \$— each, with — percent per annum, payable semi-annually, and that said total assessment of \$— was made on said lot No. —, and that this plaintiff has paid thereon, as principal and interest, the following amounts, to wit: [*give amounts*]; that said installment so paid with interest as aforesaid, was largely in excess of what was legally due and payable on said assessment of \$— at the time of such payment as aforesaid, and that said plaintiff is entitled to have the amount so illegally assessed and overpaid as aforesaid, applied as a credit on said legal assessment of \$—; and the court finds that after the amount so overpaid is applied as a credit as aforesaid, there remains unpaid at the beginning of this cause of said sum of \$— the sum of \$—.

It is therefore by the court considered, adjudged and decreed that the defendant, the city of —, and said treasurer, be and they are hereby perpetually enjoined from collecting from this plaintiff or from any portion of said lot No. —, still owned by plaintiff, and being said — feet siding on — avenue as aforesaid, any further part or portion of said sum of \$—, with interest so assessed against said lot No. —, still owned by him as aforesaid, and that plaintiff's title to all that part of said lot No. —, still owned by him as aforesaid, be and the same is hereby quieted against any portion of said assessment of said \$—, with interest, which may now remain unpaid, and said treasurer is directed to cancel and strike from said tax duplicate all that portion of said assessment of \$— which may stand against said — feet, still owned by this plaintiff as aforesaid.

It is further ordered and adjudged that the plaintiff have and recover from said defendant, the city of —, his costs herein expended, taxed at \$—.

No. 1001.

**Assessment—Entry of Declaring part Legal and part Illegal
—Enjoining Collection.**

[*Caption.*]

This day this cause came on to be heard upon the pleadings herein, and the evidence, and was argued by counsel and submitted to the court, and upon due consideration whereof, and being fully advised in the premises, the court finds that of the assessment complained of by the plaintiff in the petition herein the sum of \$—— is a legal assessment, and a valid and subsisting lien upon the several lots of land described in the petition in the amount of the several sums hereinafter specified and distributed [*description*].

And the court further finds that the excess of the said assessment above the said several sums so found to be a lien upon the said several parcels of real estate to be illegal and improperly levied by the said city of —— against the said several lots of land and said several illegal assessments amounting to the sum of \$——.

Wherefore it is ordered, adjudged and decreed by the court that as to said illegal assessment of \$—— the defendants be and they are each hereby perpetually enjoined from placing the same or any part thereof upon the tax duplicate against the lots of plaintiff in the petition herein described, or against any thereof for collection, and from attempting in any manner to collect the same, or any part thereof, from the plaintiff, and from attempting to enforce the same, or any part thereof, against the said lots, or any thereof.

It is further ordered, adjudged and decreed by the court that as to the said sum of \$—— herein found to be a subsisting and valid lien against said lots, and distributed among the same, as hereinabove set out, the temporary restraining order herein heretofore allowed be and the same is hereby set aside and held for naught, and that the city of —— pay the costs of this action, taxed in the sum of \$——.

ATTACHMENT.

No. 1002.

Entry appointing Master Commissioner to examine Garnishee.

[*Caption.*]

Upon motion of plaintiff, and upon good cause being shown therefor, it is ordered that A. B. be and he is hereby appointed as master commissioner to examine L. M., the garnishee herein.

R. S. Sec. 5532; 18 O. S. 134; 45 O. S. 653.

No. 1003.

Receiver appointed—Short entry.

[*Caption.*]

This cause coming on to be heard upon the application of the plaintiff, and good cause being shown therefor, it is ordered that A. B. be and he is hereby appointed receiver herein, and that he be authorized and required to take possession of all property and effects that have been taken by the sheriff as the property of the defendant in attachment. It is further ordered that the said receiver proceed to [*make any order necessary to be made under the peculiar circumstances*]. It is further ordered that said A. B. enter into a bond as such receiver in the sum of \$—, with sureties, to the satisfaction of the clerk of this court.

R. S. Secs. 5539, 5540.

No. 1004.

Receiver in Attachment—Appointment of, to take Possession of Property on which there are Mortgage Liens—Liens in Attachment and Execution Liens, and also an Order preserving the Priority of Liens of all Parties interested.

[*Caption.*]

This day this cause came on to be heard upon the application and motion of the plaintiff for the appointment of a receiver of the property and effects of the defendant, A. P., attached herein, the evidence adduced and arguments of counsel. On consideration whereof, and the court being fully advised in the premises (and by and with the consent of all parties hereto), it is ordered that W. B. B. be and he is hereby appointed receiver herein, and before entering upon his duties he shall take an oath to faithfully perform them, and execute a surety approved by the clerk of this court an undertaking to the State of Ohio for the benefit of whom it may concern, in the sum of \$——, conditioned according to law. Whereupon said receiver shall take possession of all the goods, chattels, property and effects that have been taken by said D. W., as constable, as the property of A. P. on attachment proceedings by this plaintiff against said A. P., and on attachment proceedings by defendants F. M. G. and J. S., E. D. and A. K. W. against said A. P., and also all goods, chattels, property and effects that have been taken or levied on by the sheriff of —— county on execution issued out of this court against defendant A. P., in favor of ——.

And he shall hold all money collected by him and property which comes into his hands subject to the order of this court. He shall receive from said constable, D. W., who is required to deliver the same to him, all the property attached in the case of F. M. G., J. S., E. D. and A. K. W. respectively, against the defendant, A. P., and in his possession, and shall receive from the sheriff of —— county, Ohio, who is hereby ordered, directed and required to deliver the same to him, all the property levied on by him, and in his possession upon executions issued out of this court on judgments against said defendant, A. P., in favor of —— bank and —— bank, M. C. H., W. R. G., J. B. and W. B. B., and also all property described in aforesaid mortgage, and said receiver is further required to give written or printed notice of his appointment as receiver herein, and to abide and perform all the orders of the court made upon him by the court herein, and it is hereby

ordered that all questions relating to the liens on all property or any part thereof and the — of such liens and all issues made or to be made by the pleadings in this case be reserved for the future consideration of this court.

It is further ordered that the transfer of said property to said receiver herein by the several parties and by said constable or any others or either of them, shall in no way prejudice the right of either of any part, and that such transfer shall in no way prejudice any lien or liens or any interest which any party may have on or in said property or any part thereof, and shall abide the further order of the court. And thereupon came W. B. B., appointed receiver herein, and was duly sworn to faithfully perform his duties as receiver in this case, and giving his undertaking conditioned according to law in the sum of \$—, B. S. B., as surety, which undertaking is approved by the clerk of this court. The clerk of this court shall receive and retain the custody of said undertaking of this court.

No. 1005.

Entry Ordering Sale of Attached Property.

[*Caption.*]

This cause coming on to be heard upon the motion of — for an order of court to sell the property taken by the sheriff under the writ of attachment herein, and it appearing to the court that said property is of a perishable nature, and that a sale thereof will be for the benefit of the parties hereto, it is ordered by the court that said sheriff proceed to advertise and sell said property according to law.

R. S. Sec. 5544.

No. 1006.

Attachment Discharged upon Error from Justice.

[*Caption.*]

This day this cause came on to be heard upon the petition in error of said plaintiff and the transcript of the justice of the peace duly certified thereto attached, together with the proofs and exhibits and the original papers from the said justice's court, and was argued by counsel and submitted to the court. And the court being fully advised in the premises, it is considered that the decision of the said justice [*naming him*] in

sustaining said attachment against said plaintiff be and the same is hereby reversed, with costs, and the said attachment be and the same is hereby discharged, and the court further orders that the judgment on the merits rendered by said justice be and the same is hereby affirmed, and that each party pay one half of the costs in this court made upon this proceeding in error.

No. 1007.

Attachment Discharged by giving of Bond.

[*Caption.*]

This day came the defendant and tendered to the court its bond and undertaking for the discharge of the attachment and garnishment proceedings herein, and the said undertaking was submitted to the court for approval, and the court finding the said undertaking in due form and the surety therein ample and sufficient and the said undertaking to be in every respect in conformity to law and statutes in such cases made and provided, the said bond and undertaking is hereby approved and the said attachment is hereby discharged, and the liability of the garnishee or garnishees in this action for any of the property of the defendant in his or their hands is likewise here also discharged.

R. S. Sec. 5545.

No. 1008.

Entry sustaining Motion to discharge Attachment.

[*Caption.*]

This cause came on to be heard upon the motion filed by the defendant, A. B., on the — day of —, 18—, and was heard upon said motion, the affidavits, exhibits and testimony, and was argued by counsel and submitted to the court, and upon due consideration thereof, and being fully advised in the premises, the court finds that said motion is well taken and therefore sustains the same.

It is ordered that the attachment in this action be and the same hereby is discharged, and the sheriff ordered to restore to the defendant, A. B., the property taken under the attachment, and the garnishee is released from all liability herein.

No. 1009.

Garnishee discharged and Share of Stock received by filing Bond.

[Caption.]

This day came the defendant, C. R. P. Co., and filed an undertaking executed to the plaintiff, according to law, in double the amount of plaintiff's claim as stated in the affidavits, which undertaking was approved by the court.

It is therefore ordered that the liability of the garnishee in this action be discharged in the shares of stock of the C. R. P. Co. sought to be held by said attachment and garnishment are also discharged.

R. S. Sec. 5550.

No. 1010.

Entry ordering Garnishee (to deliver property) (or) to pay Money into Court.

[Caption.]

This cause coming on to be heard upon the answer of —, the garnishee herein, and it appearing therefrom that said — has in his possession (property) (or, money) belonging to the defendant herein, to wit: [*describe property*] [*or, state how much money*], it is ordered that said — deliver said property (or, pay said money) to the sheriff within — days from the date of this entry.

R. S. Sec. 5550.

No. 1011.

Entry discharging Garnishee upon paying Money into Court.

[Caption.]

This day came A. S., garnishee herein, and pays into court the sum of \$—, which sum he admits by his answer herein he has in his hands belonging to the defendant, —, herein. It is therefore ordered that the said A. S. be and he is hereby discharged from further liability as such garnishee herein.

No. 1012.**Another Form of Entry discharging Garnishee upon Payment of Money.**

[*Caption.*]

This day this cause came on to be heard upon the report of A. B., upon the order of the court made herein, requiring him to appear and answer touching certain funds alleged to be in his hands, belonging to the said C. D., and it appearing to the court that he has paid into court all of the moneys in his hands belonging to the said C. D., it is ordered by the court that he be and he is hereby discharged from all liability from the said C. D., in respect to the subject of this action, without liability for costs.

No. 1013.**Entry of Judgment against Garnishee for Failure to pay Money over.**

[*Caption.*]

This cause coming on to be heard upon the pleadings and evidence (a jury being waived), was argued by counsel and submitted to the court. On consideration whereof the court finds that the defendant has failed to comply with the order of this court, requiring him to pay the sum of \$—— into this court, and that said defendant, ——, has in his hands of the moneys of said defendant, ——, said sum of \$——, and that judgment for said sum has been rendered against said —— for said sum by this court, which said judgment remains wholly unpaid and unsatisfied.

It is therefore ordered and adjudged by the court that the plaintiff recover from said defendant the sum of \$——, with interest from ——.

R. S. Secs. 5551, 5553.

No. 1014.**Entry ordering Sheriff to repossess himself of Property.**

[*Caption.*]

Upon motion of plaintiff herein, and it being made to appear to the court that the property levied upon by the sheriff under a writ of attachment issued herein, has passed

out of his hands, it is ordered by the court that he retake and repossess himself of said property, and that he proceed to sell the same according to law.

R. S. Sec. 5557.

No. 1015.

Entry of Decree in Attachment determining rights of Attaching Creditors upon motion for Distribution of Fund.

[Caption.]

And the court now coming to a distribution and finding of the liens upon the said goods sold under the former order of said sale herein, and the priorities thereof, it is considered and adjudged by the court that the first and best lien upon said goods is that of the — company for freight and storage, being the sum of \$—; that the lien of P. H. & Co. being the lien set out in favor of the claim set forth in cause No. — in this court being in dispute, it is ordered and adjudged that the sheriff retain in his hands, after payment of the lien of the — company the sum of \$— to meet the same, and the costs of suit and attachment therein in case the same shall be held a good and valid lien; that the next lien upon said goods is the claim of J. A. D., being the sum of \$—, together with the cost of suit and attachment being the claim set out in this cause; then the claim of S. A. C., being the sum of \$—, together with the cost of suit and attachment in the claim set out in case No. — in this court; then the claim of G. R. Co., being the sum of \$—, in which there has been paid the sum of \$—, leaving a balance with the interest, together with the cost of said suit and attachment being the case of No. — in this court.

And the court coming now to distribute the proceeds of said sale, amounting to the sum of \$—, it is ordered that the sheriff out of the amounts in his hands pay first to the — company the sum of \$—, being in full of the amount found due it, with interest. Second, that he shall, after reserving the sum of \$— in order to meet the claim of P. H. & Co. and the cost of suit and attachment in case No. —, should the same be held a valid and subsisting lien, pay the costs of this action and attachment herein, taxed at \$—. Third, to the plaintiff herein, J. A. D., or his attorneys, the amount heretofore found due with interest, being the sum of \$—.

From Putnam, Hooker & Co. v. Loeb & Schoenfeld, 2 O. C. C. 110.

ATTORNEYS AT LAW.

No. 1016.

Entry allowing Attorney certain Fees for Services out of certain Properties in an Estate.

[*Caption.*]

This cause now coming on for hearing upon the questions presented by the issues for allowance to L. J. C. for his services as counsel for plaintiffs, for services rendered to said estate, and the court, being fully advised in the premises, finds and holds that such allowance to said L. J. C. for his said services should be \$——, and said allowance and fee to him are hereby fixed at that sum, to be paid to him as follows: \$—— of said sum to be paid to him by the plaintiff's executors out of any of the assets of the estate of said F. C., deceased. The remaining \$—— of said allowance the court finds and holds to be a proper charge as against said real estate of said testator, and the same are hereby made a charge and lien upon said real estate of said testator in said sum. The said charges against said estate for attorney's fees are hereby so made against said real estate subject to the dower estate of M. J. S. in said premises.

It is therefore ordered, adjudged and decreed that L. J. C. do recover of J. C. D., the executor of said estate, said respective sums, and in default of payment therefor at said respective times, execution issue therefor.

No. 1017.

Disbarment, Proceedings in—Entry by the Court on its own volition appointing Attorneys to investigate unprofessional charges against an Attorney at Law.

[*Caption.*]

The matter of charges against ——, an attorney at law, for alleged misconduct in office, etc., so coming to the knowledge of this court and the judges thereof, by the testimony of

witnesses in the trial in this court of the case of — against —, that —, an attorney at law, practicing in this court, is probably guilty of misconduct in his office as such attorney at law, and of unprofessional conduct involving moral turpitude in the matter of —, it is ordered that —, and —, and —, attorneys at law of this court, be and they are hereby appointed and ordered to file in this court written charges against said — in the said matter, stating distinctly the grounds of complaint, and without unnecessary delay, and that they prosecute any such written charges that may be filed by them.

No. 1018.

Disbarment—Entry of Finding by the Court, exonerating said Attorney at Law.

[*Caption.*]

This — day of —, 18—, this cause came on further to be heard before the Honorable —, of this court, the hearing having been in progress continuously since the — day of —, 18—, and the testimony on behalf of the respondent having been closed, thereupon the members of the committee appointed by the court to conduct the investigation on behalf of the state, to wit: —, and —, and —, announce that they had no testimony to offer in rebuttal, and represented to the court that in their opinion the testimony did not sustain the charges against the respondent herein, and that on the contrary the evidence clearly shows that the respondent was not guilty of any misconduct in office or unprofessional conduct, and was not engaged in any, either directly or indirectly connected with any attempt to have done or attempt to accomplish such a result, and was and is wholly innocent of the matters alleged in the charges and specifications herein. And the members of said committee unanimously recommend to the court, composed of —, to dismiss said charges, and each thereof, and fully to exonerate said respondent as aforesaid. And thereupon the court, upon the testimony and exhibits herein, all of the said judges concurring therein, find that said charges and specifications, and each thereof, is not supported by the evidence adduced; that respondent is in nowise guilty as therein charged; that all the evidence introduced herein exonerates and vindicates such respondent, and shows that he was not connected directly or indirectly with the alleged misconduct stated in the

charges and specifications heretofore filed herein, and that said prosecution against him ought to be dismissed at the cost of the —— county.

It is therefore considered, ordered and adjudged, and decreed that said charges and specifications, and each thereof, be and they are hereby dismissed, and that said respondent go hence without day, and that the costs of this proceeding, taxed at \$——, be and the same are hereby taxed against the county of ——, and the said amount is ordered paid out of any funds in the treasury of said —— county available therefor.

No. 1019.

Disbarment—Entry allowing Committee Fee for Services.

[*Caption.*]

This court hereby allows to the said ——, and ——, and ——, \$——, which sums the court deems reasonable for their services in filing and prosecuting the within charges of this proceeding against the defendant, under appointment and order of this court heretofore made and entered, which said amounts so allowed shall be paid out of the county treasury of —— county, on the warrant of the county auditor, to whom the clerk of this court is ordered to issue to a certified copy of this entry under the seal of this court.

BASTARDY.

No. 1020.

Entry when Compromise made discharging Defendant.

[*Caption.*]

It appearing to the court that the complainant and defendant herein have agreed to compromise and settle the charge herein made, by which agreement the said defendant is to pay or secure to be paid to the complainant in full of her said claim against him on account of the charge herein made, the sum of \$——, and it appearing also that the said defendant has secured to be paid said sum of \$——, to the satisfaction of said complainant, and that he has given bond to the state of Ohio in the sum of \$——, as required by law,

which the court here approves, it is therefore ordered that the said defendant be and he is hereby discharged from further custody herein. It is further ordered that said defendant pay the costs of this prosecution, taxed at \$——, and that said complaint be dismissed.

R. S. Sec. 5617.

No. 1021.

Entry discharging Defendant when Bond given.

[*Caption.*]

This day came the defendant into court and offered his bond in the sum of \$——, with T. E. and S. F. as sureties thereon, conditioned according to law for his appearance herein at ——, which said bond the court here approves. It is therefore ordered that said defendant be discharged from further custody.

R. S. Sec. 5619.

No. 1022.

Entry when Sureties Surrender Accused.

[*Caption.*]

This day came T. E. and S. F., sureties upon the bond of the defendant herein, for his appearance before this court at —— term thereof. It is therefore ordered that the said defendant enter into a new recognizance in the sum of \$——, conditioned according to law for his appearance before this court at ——, with sureties to the satisfaction of this court, and that in default thereof that he be committed to the custody of the sheriff.

R. S. Sec. 5622.

No. 1023.

Entry Forfeiting Recognizance.

[*Caption.*]

This day came the prosecuting attorney and presented to the court a recognizance entered into by the defendant in the sum of \$——, conditioned for his appearance before this court at this date, with T. E. and S. F. as sureties. And

thereupon said defendant was called three times to appear and answer the charge herein according to the terms of said recognizance, which he failed to do. It is therefore ordered that said recognizance be and the same is hereby forfeited.

R. S. Sec. 5623.

No. 1024.

Entry of Plea—Ordering Trial by Jury.

[*Caption.*]

This day came the defendant, and the charge having been read to him, he pleaded not guilty. It is thereupon ordered by the court that the issue herein be tried by a jury.

[*The entry may then proceed with the impaneling of the jury and the other entries as under heading "TRIAL BY JURY."*]

No. 1025.

Entry overruling Motion for New Trial and Judgment upon Verdict.

[*Caption.*]

This day this cause coming on to be heard upon the motion filed herein by the defendant for a new trial, was argued by counsel and submitted to the court. On consideration whereof it is ordered by the court that said motion be and the same is hereby overruled. And the defendant having been found guilty of the charge herein by the verdict of the jury, it is therefore adjudged by the court that the said defendant is the reputed father of the bastard child of the said —, complainant herein, and that said defendant stand charged with the maintenance thereof in the sum of (\$—) — dollars, and the costs of this prosecution. It is further ordered that he pay said sum of \$— in the following manner [*here specify how payments are to be made*]. And it is further ordered that said defendant give security for the performance of this judgment to the satisfaction of this court, and in default of the payment of said sum, or in the giving of such security, that said defendant shall stand committed to the jail of the county according to law.

R. S. Sec. 5626.

No. 1026.

Entry substituting Child upon death of Mother.

[Caption.]

It having been made to appear to the court that —, the mother of the child herein, has died since the commencement of this prosecution, it is ordered by the court that the name of the said child, M. P., be substituted for that of the said mother, and that said proceeding proceed in the name of said child. And the court appoints R. T. as guardian *ad litem* for said infant, M. P., who hereby accepts said appointment.

R. S. Sec. 5628.

No. 1027.

Entry reducing Judgment upon death of Child.

[Caption.]

This day this cause came on to be heard upon the application of the defendant herein for an order reducing the judgment heretofore rendered herein against him, on account of the death of the child. And it appearing that due notice has been given of the filing and hearing of this application, and that the said child, as represented in said application, has died since the rendition of the judgment herein, it is ordered that the said judgment be and the same is hereby reduced to —.

R. S. Sec. 5630.

BOUNDARY LINE.

No. 1028.

Division Established—Mandatory Injunction Allowed.

[Caption.]

This day this cause came on to be heard upon the petition of the plaintiff, the defendants being in default for answer or demurrer in the case and the evidence, and was sub-

mitted to the court; and the court find upon the issues tendered in the petition in favor of the plaintiff, and that the line of division between the premises of the plaintiff and the defendants, a description of which is set out in the plaintiff's petition, is described by the outside of the north foundation wall of the structure described in the petition as being under process of construction by the defendants, and it is adjudged and decreed by the court that said division line between the plaintiff and defendant be and the same is hereby established on the outside boundary line of said north foundation wall and extending parallel therewith from High street to the east boundary line of the aforesaid building. And the court finds that the plaintiff is entitled to a mandatory injunction against the defendants, requiring the defendants and each of them to put the plaintiff's premises and the walk thereon in the same condition as they were at the time of the trespassing of the defendants thereon, as alleged in plaintiff's petition.

And it is further ordered, adjudged and decreed that the defendants shall, at their own expense, prior to the — day of —, put the plaintiff's premises in the same, or as good condition, as they were prior to the date of the defendants entering upon the premises of plaintiff, as alleged in the plaintiff's petition, and in default of so doing the plaintiff shall proceed to repair the walks on his said premises and place them in the condition aforesaid at the expense of the defendants, and that the defendants shall be liable to the plaintiff for the costs and expense of such repairs, and in default of so repairing said walks and premises, upon motion of the plaintiff at any time, made after the said — day of —, this judgment and decree shall be opened up, and this action set down for hearing upon the pleadings of the plaintiff upon the issues therein tendered. And it is adjudged that the plaintiff herein shall recover of the defendants his costs in this action, taxed at \$—, and judgment is awarded against the said defendants for the said sum of \$—.

CHANGE OF NAME.

(R. S. Secs. 5852—5857.)

No. 1029.

Entry Changing Name of Person.

[*Caption.*]

This cause coming on to be heard upon the petition of A. S., and it appearing to the court that due notice according to law has been given of said intended application, and that said petitioner has been a *bona fide* resident of this county for one year prior to the filing of his said petition, and the court being satisfied of the truth of the facts set forth in his said petition, and that there exists reasonable and proper cause for the changing of the name of said petitioner, it is by the court ordered that the name of said petitioner be and it is hereby changed from — to —, as prayed for, and that he pay the costs herein, taxed at \$—.

R. S. Sec. 5853.

No. 1029½.

Entry Changing Name of Town, Village, or Hamlet.

[*Caption.*]

This cause coming on to be heard upon the petition of petitioners herein, and the evidence adduced by the parties. On consideration whereof, and the court being satisfied that due notice according to law has been given of said petition, that the prayer of said petitioners is just and reasonable, that at least three fourths of the inhabitants of said [*name of town*] desire such change, and that there is no other town in the state of the same name as that which is prayed for, it is therefore ordered and adjudged that the name of said town of — be and the same is hereby changed to —, and that the petitioners pay the costs of this proceeding herein, taxed at \$—.

R. S. Sec. 5854.

No. 1030.

Change of Name of Corporation.

[*Caption.*]

This day this cause came on to be heard upon the petition herein, and the court being satisfied by the proofs adduced by the said petitioners that they are the directors of the said corporation, "The — Company," which is a corporation duly incorporated under the laws of this state, and located as stated in the petition, that 30 days' notice of the object and prayer of said petition has been duly given by publication in the [*name of paper*], a newspaper of general circulation in said — county, Ohio, and that good cause has been shown the court why said name of said corporation should be changed as prayed for in the petition.

Whereupon it is ordered by the court that the name of said corporation, "The — Company," be and the same hereby is changed to "The — Company." It is also further ordered that said corporation pay the costs of this proceeding, taxed at \$—, and that in default thereof execution issue against said corporation therefor.

R. S. Sec. 5855.

CHURCHES.

See also PARTITION.

No. 1031.

Entry authorizing Church to Sell Property to pay Debts and to Invest in other Property.

[*Caption.*]

This cause coming on to be heard upon the application of the said trustees of the said church for authority authorizing them to sell the property of said church described in their said application to pay debts and to invest in other property for church purposes, and in the meantime to mortgage one of said pieces, and it appearing to the court that notice of the hearing of this application on the — day of — had been duly published in a newspaper published in the county of — and state of Ohio, as required by law; and the court

having heard the evidence, and being fully advised in the premises, doth find that the interests of said church will be subserved by the sale of such property described in the petition, it is ordered and decreed that the plaintiff be permitted to sell both pieces of property described in the petition as soon as the same can be done to advantage, and that in the meantime the plaintiffs be permitted to mortgage the property purchased by H. M. for not more than \$——, and that they report their doings to this court.

R. S. Secs. 5812, 5813.

CONTEMPT.

(*R. S. Secs. 5639—5650.*)

No. 1032.

Entry summarily punishing Contempt in Presence of Court.

[*Caption.*]

F. E., having been guilty of misbehavior in the presence of the court, which the court deems and considers contempt of this court, it is therefore ordered that the said F. E. be and he is hereby assessed and ordered to pay a fine in the sum of \$——, and in default of the payment thereof that he stand committed to the jail of the county.

R. S. Sec. 5639.

No. 1033.

Entry instituting Contempt Proceedings.

[*Caption.*]

Information having been brought to the court of an alleged violation of an order made on the —— day of ——, 18——, [*state nature of order*] [*or if contempt be one other than a violation of an order it may be varied to suit*], it is therefore ordered that A. D., an attorney of this court, be and he is hereby appointed and instructed to prepare and prefer, in writing, appropriate charges of contempt of this court, claimed to have been committed by the said P. R., and file the same in this court on or before ——.

No. 1034.

Entry upon Filing of Charge.

[Caption.]

This day came A. D., heretofore appointed by this court to prepare and prefer a charge of contempt against the said P. R., and on behalf of the state of Ohio, and in pursuance of the order of the court, filed written charges of contempt of this court against the said P. R., for a violation of [*state whatever order may be*].*

It is therefore ordered by the court that a copy of said charge of contempt be forthwith served upon the said P. R., together with a copy of this order, and that he be required to file a written answer to said charge of contempt on or before the — day of —, and that he appear before this court on the — day of — at — o'clock — M., ready to answer said charge so made against him.

For practice in contempt proceedings, see fully Kinkead's Pleading, Secs. 427-432.

No. 1035.

Rule for Contempt allowed against Purchaser of Real Estate.

[Caption.]

On motion of the defendant, A. M. S., and for good cause shown, a rule is allowed to issue herein, directing M. E. to appear before this court before the Honorable D. F. P., one of the judges of this court, on —, —, 18—, at — o'clock, to show cause why she should not be punished for contempt of this court for her neglect and refusal to pay the purchase price for the premises purchased by her in this cause at sheriff's sale on the — day of —, 18—.

(NOTE.—The statute in this case contemplates that the charge shall be made upon motion. R. S. Sec. 5397.

No. 1036.

Order to pay Costs in Rule for Contempt for Failure to pay Purchase Money or stand committed to Jail.

[Caption.]

This day this cause came on to be heard upon the rule heretofore issued against —, requiring him to appear and

show cause why he should not be committed for contempt in not paying the sheriff of this county the amount of the purchase money for the real estate sold to him by the sheriff herein, and it appearing that the said J. J. E. has been duly served with a copy of said rule, and the court having heard the testimony and being fully advised in the premises, it is now ordered that said J. J. E. pay the said sheriff all the costs made on the order of sale herein, and of these proceedings, taxed at \$——, within ten days from the entry of this order, or stand committed to the county jail of this county until the same be paid.

R. S. Sec. 5397.

No. 1037.

Contempt for Failure to pay temporary Alimony—Order requiring Defendant to appear.

[*Caption.*]

This day this cause came on to be heard on the motion of plaintiff to require the defendant to appear in open court and show cause why he should not be punished as for contempt for refusing to perform the order of the court heretofore on the —— day of ——, 18—, made in this case requiring him to pay the plaintiff an allowance of temporary alimony during the pendency of this action, and it being made to appear to this court that said defendant has willfully disregarded said order and has intentionally not performed the same, and there being no fact or reason made to appear to the court why the defendant has not performed said order but has disregarded the same. It is now here ordered by the court that said defendant, D. R. A., appear before said court, before his Honor, D. C. B., a judge of this court, on the —— day of ——, 18—, and show cause why he should not be punished as for contempt of this court in not performing the said order, and in disregarding and ignoring the same, and it is ordered that a copy of this order be at once served upon said D. R. A.

No. 1038.

Entry ordering Accused to be brought into Court.

[*Caption.*]

(*Proceeding from *, in ante No. 1034.*) It is therefore ordered that a writ of attachment forthwith issue, directed to

the sheriff, commanding him to bring the body of the said defendant into court to answer the charge of contempt so made against him.

R. S. Sec. 5641.

No. 1039.

Entry upon Hearing—Finding Defendant Guilty.

[*Caption.*]

This day this cause came on to be heard upon the charge of contempt preferred against the defendant herein, and the said defendant having been examined concerning the charge so made against him, and the court having heard all the evidence adduced herein, and the argument of counsel, and being fully advised, finds that said defendant is guilty as charged in said complaint, and is guilty of contempt of this court.

It is therefore ordered that the said defendant pay a fine of \$—— and the costs of this prosecution, for which execution is awarded.

No. 1040.

Entry allowing parties to Purge themselves of Contempt.

[*Caption.*]

This cause came on for hearing upon the evidence and was submitted to the court; and the court finding the said H. R. G., etc., guilty of contempt as charged in the information and complaint filed herein; and thereupon the said H. R. G., etc., having expressed a desire to purge themselves of the aforesaid contempt, and in order so to do did in open court say and declare that they would each of them forthwith resign as directors of the —— company, now by virtue of such declaration and conditioned thereon, the said H. R. G., etc., are permitted to go hence, but the said F. V. H., persisting in his aforesaid contempt, it is ordered and adjudged that he pay a fine in the sum of \$——, and the cost of this proceeding, taxed at \$——.

CORPORATIONS—DISSOLUTION OF.

No. 1041.**Dissolution of Solvent Corporation—Appointment of Referee.***[Caption.]*

Upon the filing of the petition, accounts, inventory, statements and affidavit herein, the court doth here appoint I. H. C. referee, to hear the allegations and proof of the parties herein to take testimony in relation thereto, and with all convenient speed report the same to the court with a statement of the property, effects, debts, credits and all engagements of the said corporation C. E. M. Company, and all other matters and things pertaining to this affair. The time fixed by said I. H. C., referee, as aforesaid, is the — day of —, 18—, at room —, in — building, in the said city of C., Ohio, and all persons interested in said corporation are hereby required to show cause, if any they have, before said referee at said time and place, why said corporation should not be dissolved, and said I. H. C. appeared before the court and was duly sworn as said referee.

R. S. Sec. 5654.

No. 1042.**Entry Dissolving Corporation upon Report of Referee—Appointment of Receiver to wind up Affairs.***[Caption.]*

This day this cause came on to be heard upon the report, testimony and exhibits filed by I. H. C., referee, heretofore appointed herein by a former order of this court, the court finding that three weeks' notice has been duly published as required by said order, and being fully advised in said premises the court doth find that a dissolution of said corporation C. E. M. Company, organized under the laws of the state of Ohio, will be beneficial to the stockholders thereof and not injurious to the public interests, and that the business of the said corporation has been entirely abandoned, and that it is

impossible to accomplish the business for which the same was formed and incorporated.

It is therefore considered and adjudged by the court that the said corporation, C. E. M. Company, be and the same is hereby dissolved.

It is further ordered that the C. M. be and he is hereby appointed receiver of the estate and effects of the said dissolved corporation, he being hereby invested with all the estate, both real and personal, of said corporation, and to be a trustee for the benefit of said dissolved corporation, with all power and authority conferred by law upon trustees to whom assignments are made for the benefit of creditors, upon giving a bond payable to the state of Ohio in the penal sum of \$——, with surety to the approval of this court, conditioned for the faithful discharge of the duties of his appointment and for the due accounting of all money received by him.

R. S. Sec. 5656.

No. 1043.

Form of Report of Referee.

[*Caption.*]

Now comes I. H. C., referee, heretofore appointed, to wit: on the —— day of ——, 18——, by this court, and submits his report to the said court as follows, to wit: On the —— day of ——, 18——, pursuant to the notice herein filed, and at the time and place named in said notice, and on the —— day of ——, 18——, to which dates respectively said hearing was continued, I heard the testimony, on oath, of witnesses called by the parties hereto, and considered the exhibits and testimony offered herein. On consideration of said evidence, exhibits and testimony, I do find:

1st. The said C. E. M. Company is a corporation organized under the laws of the state of Ohio, having its principal office and place of business at the city of C., —— county, Ohio.

2d. Said corporation was formed for the purpose of manufacturing and publishing, and carried on said business at C., Ohio, until the —— day of ——, 18——.

3d. The capital stock of said company consists of —— shares of \$——, of which the sum of \$—— has been paid in by the respective stockholders. Said stock is held by [*here follows name and amount of stock*].

4th. On the — day of —, 18—, a meeting of the stockholders of the C. E. M. Company was held at the office of said company in C., and a resolution was duly adopted requesting the directors of said company to enter into a contract with H. A. C. Company, and therefore to sell and transfer to said B. A. C. Company the stock of manufactured goods and all property of said C. E. M. Company, and further authorizing and directing the said board of directors to take all necessary steps to bring about the dissolution and winding up of the affairs of the said C. E. M. Company. Said resolution was adopted by the affirmative votes of the stockholders present, representing — shares of the capital stock.

5th. On the — day of —, 18—, the directors of the C. E. M. Company entered into a contract with the B. A. C. Company to sell and convey to said company all of the property of said C. E. M. Company on said last-mentioned date, said board of directors authorizing and directing C. E. M. and L. C. J., the president and secretary of the said C. E. M. Company, to make the sale and transfer the property provided for by the aforesaid resolution, which was accordingly done.

6th. The assets of the C. E. M. Company, on the — day of —, 18—, were as follows: [*here follow with assets and liabilities*].

No. 1044.

Form of Report of Receiver.

[Caption.]

Now comes C. E. M., receiver of said company, and represents to the court that since his said appointment herein he has published, according to law, notice of his said appointment, a duly verified copy of which notice is hereto attached; that since the filing herein of the report of the referee he has paid and discharged all of the liabilities and debts of said company, amounting to the sum of \$—, the court costs herein taxed at \$—; to the stenographer appointed by the said referee to take testimony at a hearing of said referee, the said sum of \$—; to I. H. C. for his services as said referee the sum of \$—; to M. M. B. for legal services the sum of \$—; that there is left in his hands for distribution among the stockholders of said company the sum of \$—. He further represents to the court that since coming in and filing of said report of said referee, C. E. M.

has purchased the shares of the capital stock of said company heretofore owned by J. P. G., the certificate of which stock is hereto attached; that prior to the filing of the petition herein for dissolution, the following described real estate was by order and direction of said company, through its duly authorized officers and agents, by deed in fee simple, conveyed to C. E. M. in trust for the use and benefit of said company, to wit: [*here give description of real estate*]; that said land was taken by said company in payment of the following debts due said company, the same being set out in the said petition of the company.

No. 1045.

Final Entry allowing Report of Receiver.

[*Caption.*]

Upon the coming in of the report of the receiver herein, and it appearing to the court upon satisfactory evidence that the same is correct in all respects, it is ordered, adjudged and decreed that said report be the final account of the said receiver, and that the same be conclusive on all the creditors and stockholders of said corporation and upon all persons having engagements with it. It is further ordered, adjudged and decreed that said sum of \$——, now in the hands of said receiver for distribution, be paid and distributed to C. E. M., he being the owner of the entire stock of said company, and that all the equitable right, title and interest heretofore had by said company to the real estate be and the same is by the operation of this decree hereby vested in the C. E. M., his heirs and assigns forever, with all promissory notes, accounts, property, bills receivable and all choses in action of every kind and description whatsoever belonging and due the said C. E. M. Company, is hereby ordered to be assigned and the same are hereby transferred to the said C. E. M., in satisfaction of the payment of the difference due him, the said C. E. M., on account of his distributive share of and right to the assets of the said dissolved company by reason of his being the owner of all the capital stock of said company.

No. 1046.

Dissolution of Masonic Mutual Benefit Association and Distribution of Funds in the Hands of said Company.

[*Caption.*]

This day this cause came on to be heard, having been regularly assigned for trial, and was heard upon the pleadings, evidence and exhibits, and was argued by counsel and submitted to the court, and on consideration thereof the court do find that the defendants, W. V. H. and E. R. D., were not members of the M. B. Association in the petition named at the time of the bringing of this action, and that their names were inadvertently among the list of defendants, and that said parties, by reason of non-payment of assessment, had forfeited their interest in the funds and property of said association, and have no right to nor interest in said association; that the defendant, J. N., died during the pendency of this action, and that C. E. T., A. C. and J. H. H. died at or about the time of the bringing of this suit; that prior to the commencement of this action the board of trustees of said association paid in full the death claim of C. E. T.; that under the direction and order of this court the said trustees has paid the claim arising from the death of A. C. and J. H. H., and that there are no additional claims existing against said association.

The court do further find that there is now in the hands of said trustees of said association, belonging to the expense fund thereof, the sum of \$——, which expense fund, excepting a few dollars realized from the sale of furniture, arose wholly from assessments made in the manner provided for by the constitution, rules and regulations governing said association, and as in the petition mentioned; that all the surviving members of said association are defendants herein, and that each and all have voluntarily entered their appearance herein, and that those who have not consented to and requested a distribution of the fund belonging to said association are in default for answer and demurrer; that the said surviving members constitute, as regards said fund, a partnership, and are the only persons in any manner interested in said fund; that said fund constitutes the only fund and the only property of any character whatsoever belonging to said association; that the purpose for which said association was organized can no longer be carried on, and that it is not desirable, practicable or possible to continue the operation thereof, and to

attempt to do so would work injustice to such members, and in justice to said surviving members the said association ought to be dissolved, and the fund belonging thereto distributed among them as partners according to the amount contributed thereto by each, and that each and all of said members ought to be removed from any and all further assessments for any purpose.

The court do further find that the allegations in the petition contained* are true; that J. E. S., as attorney for said association, and E. M., as president thereof, have rendered valuable services to said association in the preparation and trial of this proceeding, and in all distribution provided for herein, and it is ordered that the said board of trustees shall first pay out of said fund the costs of this action amounting to \$——; to J. E. S., as compensation for his services rendered herein, the sum of \$——; to E. M., as president and acting secretary of said association, for services rendered by him, the sum of \$——, and the residue of the fund, to wit: \$——, belonging to said association, shall be distributed among the surviving members thereof according to the amount paid to said association by said respective members. The court further finds that each of said members are entitled in said distribution to —— percent of the amount paid in by him, and that the list of membership, the number of assessments, and the amounts paid by each member, and the sum to which each member is entitled, is as follows:

Names of Members.	Number of Assessments.	Amount paid on Assessment.	Dis. Share out of Funds.
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The court do further find that the amount placed opposite the name of each person set out in the column "Distributive share out of funds belonging to said association" is the whole amount and the only amount to which each of said members is entitled, and represents the entire interest of each of said members in said association. It is therefore ordered, adjudged and decreed that no further attempt shall be made to operate the said association; that each and all members are hereby relieved from the payment of any and all further assessments for any purpose whatever, and that the trustees of said association are hereby forbidden to order, levy, collect or receive any further assessments or to pay any further death claims, and that E. M., the president and acting secretary of said association, shall proceed forthwith to distribute the said \$——, and shall pay to each and all said members the amount of his distributive share as the same is hereinbefore determined, and report the same to this court.

And thereupon came the parties hereto, and all being before the court, and it appearing that the distribution hereinbefore directed has been made as ordered by this court, and that there remains nothing further to be done by the officers or members of the said association, it is hereby ordered, adjudged and decreed that the said association be and the same is hereby dissolved, and it appearing that the vouchers showing judgments are very numerous, it is ordered that the same be not recorded but preserved for the protection of said E. M.

DIVORCE AND ALIMONY.

(*R. S. Secs. 5689—5706.*)

No. 1047.

Entry ordering Personal Service of Summons and Petition Outside of State.

[*Caption.*]

This day this cause came on to be heard upon the affidavits of A. C., the plaintiff, and it appearing to the court that the defendant herein resides in the state of —, in or near the city of —, and that service of summons can not be made on him within this, the state of Ohio, it is hereby ordered by the court that personal service of a copy of the summons and petition be made upon him without the state, and that E. J., a resident of the city of —, be and is hereby authorized and directed to serve him with summons, and due return thereof to make according to law on or before the — day of —, 18—.

R. S. Sec. 5693; *Holland v. Holland*, 29 W. L. B. 98.

No. 1048.

Entry Authorizing Service by Publication.

[*Caption.*]

A. B., plaintiff, having filed herein her affidavit in which she alleges that the residence of the defendant is unknown to

plaintiff, and that the same can not with reasonable diligence be ascertained, said plaintiff is hereby authorized to give notice to said defendant by publication according to law.

R. S. Sec. 5693.

No. 1049.

Entry Allowing Temporary Restraining Order upon filing Petition.

[*Caption.*]

This day this cause coming on to be heard upon the petition of the plaintiff and her application for a temporary injunction, was submitted upon said petition, used as an affidavit, and the arguments of counsel. And the court being fully advised, that a temporary injunction should be allowed against the defendant as prayed for.

It is therefore this day considered and adjudged that the said defendant, L. M. L., be and he is hereby enjoined and restrained until the further order of this court, from coming about the property of the said plaintiff at No. ————street, in the city of ———, Ohio, and from in anywise interfering with her or offering any violence toward her, and the plaintiff is excused from giving any bond for this injunction according to the statute in such cases.

No. 1050.

Allowance of Temporary Alimony.

[*Caption.*]

Upon motion of the plaintiff herein by her attorney, and upon good cause being shown, it is hereby ordered that the said plaintiff be allowed the sum of \$—— for the support and maintenance of herself during the continuance of this action. And it is therefore ordered that the said defendant pay to said plaintiff or her attorneys the sum of \$—— immediately after the filing of this entry, and the sum of \$—— on the — day of ———, 18——, and in default of any such payment after — days, execution is allowed to issue therefor.

Whittaker's Civil Code, Sec. 5701; Kinkead's Code Pleading, Sec. 525.

No. 1051.

Entry allowing additional Alimony *pendente lite*.

[Caption.]

This day this cause came on to be heard on the motion of the plaintiff for further and additional alimony *pendente lite*, and was argued by counsel and submitted to the court. Upon consideration thereof, and being fully advised in the premises, the court finds that the said motion is well taken and therefore sustains the same.

And the court hereby orders that the plaintiff be allowed the further additional sum of \$——, for her support and maintenance during the continuance of this action, and it is ordered that the defendant pay to the clerk of this court, for the use of the plaintiff herein, the said sum of \$—— in payments as follows, to wit: On the —— day of —— the sum of \$——, and on the —— day of —— the sum of \$——, and in default of said payments, or any of them being made when due and payable, then it is ordered that execution issue thereon as upon a judgment at law.

Whittaker's Civil Code, Sec. 5701; Kinkead's Code Pleading, Sec. 525.

No. 1052.

Divorce—Allowance of Temporary Alimony out of Salary.

[Caption.]

This day this cause came on to be heard on the motion of plaintiff for temporary alimony, and the affidavits filed in support thereof, as well as those filed in opposition thereto, was argued by counsel and submitted to the court. Whereupon the court, being fully advised in the premises, doth find the motion well taken and doth sustain the same.

It is therefore considered by the court that the wages of the defendant, W. B., earned and due him for the current month of ——, payable on pay day, to wit: ——, 18—, or thereabout, be paid by the P. C. C. & St. L. Railway Company to the clerk of this court, to be by him paid to the plaintiff through her attorney of record in this case, and that plaintiff do recover as aforesaid the sum of \$——, as alimony *pendente lite*, to which finding and judgment defendant by his counsel excepts.

No. 1053.

Ordinary Decree for Divorce.

[Caption.]

This day this cause came on to be heard upon the petition (*or*, pleadings) and the evidence (the defendant not appearing). On consideration thereof, and the court being fully advised in the premises, finds that the defendant has been duly and legally served with summons and process, (and that he has failed to appear, and is in default for answer or demurrer); ** that at the time of the filing of the petition herein the plaintiff was a *bona fide* resident of the state of Ohio, and of the county of —, for one year next preceding said filing of said petition, and that said parties were married on the — day of —, 18—, as alleged in said petition, and that — (*names*) children were born of said marriage and reside in —, (*or*, and that no children have been born of said marriage), and that the defendant has been guilty of (extreme cruelty toward plaintiff), as alleged in said petition; (*or*, and that he has been an habitual drunkard for more than three years prior to the filing of the petition); and that said plaintiff is therefore entitled to a divorce, as prayed for in said petition.

(*a*) It is therefore ordered, adjudged, and decreed that the said marriage relation now existing between said parties be and the same is now here dissolved, and the said parties are hereby released therefrom, and that the said plaintiff be and she is hereby restored to her maiden name of —,* and that she pay the costs of this proceeding.

R. S. Sec. 5695; Kinhead's Code Pleading, Sec. 522.

No. 1054.

Withdrawal of Answer and Reply—Hearing upon Petition and Evidence.

[Caption.]

This day this cause came on to be heard upon the petition of the plaintiff, the answer of the defendant and the reply of the plaintiff having been, by consent of the court, withdrawn from the files, and also upon the evidence adduced and arguments of counsel.

[Proceed as in No. 1053.]

No. 1055.

Entry where Constructive Service is had.

[*Caption.*]

This day this cause came on to be heard upon the pleadings, evidence and arguments of counsel, and the court being fully advised in the premises finds that the defendant has been duly and legally served by publication according to law, and that he has failed to appear and is in default for answer or demurrer to the petition and that the allegations thereof are confessed by him to be true.

[*Then proceed from ***, ante No. 1053.]

No. 1056.

Entry of Decree on Answer and Cross Petition—When contested.

[*Caption.*]

This cause came on this day to be heard upon the petition, the answer and cross petition, and reply thereto, and the evidence adduced by the parties. On consideration thereof, and the court being fully advised in the premises, finds that the plaintiff at the time of filing his petition had been a *bona fide* resident of the state of Ohio and county of ——— for one year next preceding the filing thereof, and that the parties were married at the time and place alleged in said petition, but that the other allegations in said petition contained are not true, and that said plaintiff is not entitled to a divorce as prayed therefor therein, and the court refuses the same to him.

The court finds that the said allegations contained in the answer and cross petition are true, and that the said plaintiff has been guilty of extreme cruelty as alleged therein, and that said defendant is, by reason thereof, entitled to be divorced from said plaintiff.

[*Proceed from (a) as in ante No. 1053.*]

No. 1057.

Divorcè awarding Custody of Child to Mother, and Enjoining Husband from Visiting it.

[*Caption.*]

[*Proceed from * in ante No. 1053.*]

It is further ordered, decreed and adjudged that the custody, care, maintenance, education and control of the said minor child, C. W., until the further order of this court, be and the same is hereby awarded and confided exclusively to the said plaintiff, L. W., and the defendant, J. W., is hereby enjoined from interfering in any manner with either of said child, C. W., or with this plaintiff in her custody of said C. W., and from visiting said child until the further order of this court.

It is further ordered that (plaintiff) defendant pay the costs of this proceeding.

Kinhead's Code Pleading, Sec. 523.

No. 1058.

Entry awarding exclusive Custody to One, and Enjoining Interference.

[*Caption.*]

[*Proceed from *, ante No. 1053.*]

It is further ordered, adjudged and decreed that the care, custody, education and control of the said children, to wit: [*names*], be and the same is hereby confided exclusively to the said plaintiff, E. J. D., until the further order of this court. And the said C. R. D. is hereby enjoined from interfering in any manner with either of said children, or with the said E. J. D. in the custody of said children, until the further order of this court.

Kinhead's Code Pleading, Sec. 523.

No. 1059.

Entry decreeing Divorce where Contract has been made by the Parties dividing Property.

[*Caption.*]

Now comes the plaintiff, and the defendant having been duly served with a summons and a copy of the petition here-

in and having failed to appear, the court find that he is in default for answer and demurrer to said petition and amended petition, and find that the allegations thereof are confessed to be true. The court also finds that the plaintiff at the time of filing her petition and amended petition, has been a resident of Ohio for a year next preceding the same, and was at the time a *bona fide* resident of this county, and that the parties hereto were married as in said petition set forth. The court further find upon the evidence adduced that the defendant has been guilty of gross neglect of duty and cruelty to the plaintiff, and that by reason thereof the plaintiff is entitled to a divorce as prayed for.

It is further ordered, adjudged and decreed by the court that the marriage contract heretofore existing between the said S. M. and S. N. be and the same is hereby dissolved, and both parties are released from any obligations of the same.

The court further finds that the contract entered into by the parties hereto, dividing the personal and real property, is a valid and subsisting contract; that its terms are satisfactory to both parties, and therefore confirms the same; that the deeds heretofore made by these parties are confirmed, and that the right of dower of the defendant in the property so deeded to the plaintiff be barred and annulled therein.

No. 1060.

Allowance of Alimony in Real Estate—Also in Money.

[*Caption.*]

[*Proceed from (a), No. 1053.*] It is therefore ordered and adjudged that the said plaintiff have and possess as and for her alimony the following described real estate, to wit:

[*Description.*] And the said defendant is hereby ordered to convey said premises and the improvement thereon and all of the appurtenance thereunto belonging to said plaintiff, her heirs, and assigns forever, by a good and sufficient deed in fee simple, free from any right or claim of said defendant to any estate in dower or otherwise therein.

And it is further ordered upon the failure by said defendant to execute said conveyance within ——— days from the entry hereto, this decree shall operate as such conveyance, and in that case it is ordered that the clerk cause so much of this decree to be recorded in the office of the recorder of this county as will show such change of title. And it is further ordered and adjudged that said plaintiff do also have and

possess and enjoy, as and for alimony, the following personal property, with the right to use, sell or dispose thereof at her pleasure, to wit: [*Description.*]

It is further ordered and adjudged that the defendant pay to the plaintiff, as her reasonable alimony, in money, the sum of \$——, payable as follows, to wit:

And in default of any such payment for three days, execution is allowed to issue therefor.

R. S. Secs. 5699, 5700; Kinkead's Code Pleading, Secs, 525, 526.

No. 1061.

Allowance of Alimony making it a Charge upon Real Estate.

[*Caption.*]

[*Proceed from (a), ante No. 1053.*] It is further ordered, adjudged and decreed that said plaintiff have and possess and enjoy as and for permanent alimony the sum of \$——, as follows: The sum of \$—— in —— from the date of this decree; the sum of \$—— in —— from the date of this decree, etc.; and that execution may be issued on default of any one of said payments within —— days after such default, and that all of said alimony be made a binding charge and a valid and subsisting lien on the real estate owned by said defendant, and which said real estate is described in the petition in this case, and is here described as follows, to wit: [*Description.*]

R. S. Secs. 5699, 5700; Kinkead's Code Pleading, Secs. 525-6.

No. 1062.

Entry divesting Wife of Inchoate Right of Dower when Alimony has been paid.

[*Caption.*]

[*Proceed as in No. 1053 *.*]

It is further ordered, adjudged and decreed that the said defendant, J. W., pay to said plaintiff as and for alimony the sum of \$——, one half in —— days, and the residue in ——; and the court finds that at the entering of this decree that said alimony has already been paid and secured to be paid to the attorney for plaintiff in this case, and that the said defendant, J. W., pay the costs herein, taxed at \$——.

It is further ordered, adjudged and decreed by the court that said plaintiff be deprived and divested, in consideration of the payment of said alimony, of her inchoate right of dower in any and all real estate held by said defendant, J. W., during coverture; and in like manner that the said defendant, J. W., be deprived and divested of all right of dower in any and all real estate of said plaintiff owned and held by her at any time during coverture, and that the said parties respectively, upon the entering of this decree, shall quit-claim to the other, or to such person or persons as are legal owners holding title to any of said lands, the said inchoate right of dower, and upon failing to make such quit-claim deed or deeds, that this decree shall operate as such conveyance and discharge of said inchoate right of dower.

No. 1063.

Decree settling Property Interest, Restoring to each their Property.

[*Caption.*]

[*Proceeding from ante No. 1053.*]

And the court finds that the plaintiff is the owner of the following-described real estate in the petition mentioned, to wit: [*description*], and the same is hereby restored to him, divested of all and every claim, title or interest by dower or otherwise of his said wife. And the court finds that the defendant is the owner of the following-described real estate, to wit: [*description*], and the same is hereby restored to her, divested of all and every claim, title or interest by dower or otherwise by her said husband.

And it is further ordered, adjudged and decreed that the said plaintiff do also have, possess and enjoy, as and for his own, the following personal property, with the right to use, sell or dispose of it at pleasure: [*description.*]

And it is further considered by the court that the plaintiff pay the costs of this proceeding, taxed at \$——.

No. 1064.

Divorce not granted — Alimony granted Plaintiff for Children and Herself.

[*Caption.*]

[*Proceed as in the other entries herein.*]

And the court finds that the defendant is the owner of the following-described real estate not heretofore disposed of, to wit: [*here describe the premises.*]

The court further finds that the plaintiff is the owner of the following-described premises, to wit: [*here describe the premises*], and the same is hereby restored to her, divested of all and every claim, title or interest by curtesy or otherwise of her said husband, and she is hereby vested with the right and power to acquire, hold and manage and dispose of the property, money and choses in action, to maintain suits in her behalf, free from the control and interference of the said defendant, and all right, title, claim or interest of the said defendant, by dower or otherwise, is hereby forever cut off from said premises, and the title thereto vested in the plaintiff free and clear from any such right by dower or otherwise of said defendant.

The court further finds that said last-described property is encumbered by three mortgages theretofore executed to secure a debt of said defendant, which mortgages are recorded in volume —, page —, — county, volume —, page —, — county, and volume —, page —, mortgage records — county, Ohio, and are also a lien upon the first-described premises.

It is therefore ordered and adjudged as between plaintiff and defendant that said first-described premises be subjected to the payment of said three mortgages before the said property owned by the said plaintiff is subjected thereto.

The court further finds that reasonable alimony for the maintenance and support of two minor children, — and —, ought to be decreed in this case, and it is thereupon ordered and adjudged that the said defendant pay to the said plaintiff the sum of \$— per week for the maintenance and support of said children, payable at the end of each — weeks, and the same is made a charge upon said real estate as herein described.

The court further finds that said plaintiff is entitled to reasonable alimony, and it is further ordered and adjudged that the defendant pay to the plaintiff's attorney, as her reasonable alimony, in money, the sum of \$—, within — days from the entering of this decree, and the same is hereby made a lien upon said real estate here first described, and in default of any such payment of any of such alimony hereinbefore allowed, for three days, execution is allowed to issue therefor; and the court further finds that said first-described property is rental property, and rents for about the sum of \$— per month, and it is here now ordered that said plaintiff be and she is hereby authorized to lease said property and collect the rents thereof, and apply the same upon the amounts hereinbefore ordered to be paid by the defendants

for the maintenance of said minor children until such time as said property is sold, and the court hereby secures to said plaintiff all her rights of dower in said property or otherwise.

No. 1065.

Decree for Alimony rendered by Circuit Court, where Money is to be invested.

[*Caption.*]

This cause having been submitted on the evidence, the court finds therefrom that the proof does not sustain the allegations as to extreme cruelty so far as personal violence is concerned, but the court is satisfied that the defendant was guilty of gross neglect of duty and of abandonment of the plaintiff without sufficient cause. Plaintiff is therefore awarded by the court as alimony for the support of herself and child the sum of \$—— per annum, payable in equal quarterly installments beginning —, 18—, or, if she prefer, the sum of \$—— in gross, payable within a reasonable time, the sum of \$—— to be vested in a trustee, to be invested in mortgage or other safe security, and the yearly net income to be applied to the support, maintenance and education of the said child. That upon said child obtaining its majority, or in the event of its death before that time, such trust fund, with its unexpended accumulation, if any, shall be paid to the plaintiff. But if the alimony in gross, if accepted, shall be in full of all right and claim of plaintiff to dower vested or contingent in the real estate now owned, or that may be acquired by the defendant in full satisfaction and discharge of any and all present or future interest of the plaintiff as wife or widow in defendant's personal estate now owned, or that may be hereafter acquired by him, that plaintiff may elect which one of the foregoing provisions she will accept. And thereupon the plaintiff, in open court, and by her counsel, elects to accept the second of the aforesaid provisions, to wit: alimony in gross. It is therefore adjudged and decreed that within a reasonable time from the entering of this decree, to wit: — days, the defendant shall pay to the plaintiff the sum of \$——, and to some proper person to be hereafter appointed by the court trustee as aforesaid, upon his giving bond to the satisfaction of the probate court of — county, Ohio, the sum of \$——, within — months, to be invested according to the laws relating to the appointment and conduct of trustees in Ohio, and that the net yearly income

thereof is to be applied to the support, maintenance and education of G. C., the said child of the parties hereto. It is further ordered, adjudged and decreed that upon said child obtaining its majority, or in the event of its death before that time, the trusteeship of said sum of \$—— shall terminate, and the said trustee shall turn over the same, with any unexpended accumulation, to the plaintiff. It is further ordered, adjudged and decreed that for the security of the payment of the said alimony heretofore ordered and decreed, and accepted by the plaintiff, shall be a lien upon all the real estate of the said defendant. It is further ordered and decreed that upon defendant paying the alimony, as aforesaid, adjudged and decreed, and accepted by the plaintiff, the plaintiff shall be forever barred of any further right or claim or to dower vested or contingent in the real estate of the defendant now owned or hereafter claimed by him, and barred of any and all present or future interest in defendant's personal estate as wife or widow.

DOWER.

(*R. S. Secs. 5707—5725.*)

No. 1066.

Entry of Judgment for Assignment of Dower.

[*Caption.*]

This cause coming on to be heard upon the petition of the plaintiff herein, and it appearing that all the parties hereto have been duly and legally served, and that (they are all in default for answer or demurrer), and the court being fully advised in the premises finds that the plaintiff, [name], is the widow of [name], deceased, and that the said [name] died intestate, and possessed in fee simple of the premises in the petition described, and that the plaintiff, as such widow, is entitled to dower in said premises.

It is therefore ordered and adjudged by the court that [names], three judicious, disinterested men of the county, be and they are hereby appointed as commissioners herein to assign the said dower of the said [name] in said premises;

and it is further ordered that an order issue to the sheriff of the county, commanding him that by the oaths of said commissioners above named, he cause to be set off and assigned to said plaintiff her said dower by metes and bounds [*or in the manner desired*], and that due report of their proceedings be made thereunder.

R. S. Sec. 5712.

No. 1067.

Entry of Confirmation of Report of Commissioners and Return of Sheriff.

[*Caption.*]

This cause coming on to be heard upon the return of the sheriff of the order for the assignment of dower to plaintiff herein, heretofore issued herein, and of the proceedings of the commissioners thereunder, and the court having carefully examined the same and finding their said proceedings and the assignment of the dower right of said plaintiff in and to the premises in her said petition in all respects regular and in conformity to law and the order of the court, the same are hereby approved and confirmed.

And it is further ordered by the court that the said assignment be entered in the records of this court, and that the same shall henceforth be valid and effective in law, and that the said plaintiff shall hold her dower as therein assigned, and that a writ of execution issue herein, directing the sheriff to place the said plaintiff in full possession of the dower so as aforesaid assigned to her, and that the plaintiff pay the costs herein to be taxed.

R. S. Sec. 5113.

EXECUTOR'S AND ADMINISTRATOR'S SALE OF REAL ESTATE IN COM- MON PLEAS COURT.

No. 1068.

Hearing and Order to Appraise.

[*Caption.*]

This day this cause came on to be heard upon the petition, the other pleadings in this case and the evidence, and the court being fully advised in the premises finds that all the parties in interest have been duly served with process and are before this court; that the statements and allegations in the petition are true, and that it is necessary to sell the real estate described in the petition for the purpose of paying the debts of the decedent.

It is therefore, on motion to the court by counsel for plaintiff, ordered that J. R., J. F. and L. H., three judicious and disinterested men in the vicinity, freeholders, being duly sworn, do, upon actual view of the premises in the petition described, make a just valuation of said real estate, free of dower interest of D. D., to this court with all convenient speed.

No. 1069.

Executor's Sale of Real Estate—Confirmation of Appraisement.

[*Caption.*]

Now comes counsel for the plaintiff and produced to the court the report of the appraisement herein made by J. J. R., J. F. and L. H., in pursuance of a former order of this court, and it appearing upon examination that said report is in all respects regular and correct the same is hereby approved and confirmed, and it is ordered that said plaintiff proceed according to law to sell the real estate in the petition described, free of dower estate of V. D. upon the premises, at not less than two thirds of said appraised value, and upon the deferred payments not exceeding two years.

No. 1070.

Confirmation of Sale.*[Caption.]*

Now comes counsel for plaintiff and produced to the court the report of sale made by said plaintiff in pursuance of an order hereinbefore made, and it appearing upon examination that said report has in all respects been legally made the same is approved and confirmed, and the said plaintiff is ordered to execute and deliver to the purchaser, J. F., upon his compliance with the terms of sale, a proper deed of the real estate so by him sold as aforesaid.

The court now coming to distribute the proceeds of the sale made in this cause, amounting to \$—, it is ordered that the plaintiff pay out out of said proceeds, first, taxes and penalties which are now a lien on the premises described in the petition, all street and sewerage assessments to be paid by the purchaser according to agreement; second, the costs of this action, taxed at \$—; third, that he pay an attorney fee of \$—; fourth, his own commission on proceeds of sale, amounting to \$—; fifth, to V. D., \$—; sixth, to S. D., \$—; seventh, to M. D., \$—. After the payment of all future costs and expenses of the administration of the estate of said decedent, the balance of proceeds of said sale shall be paid in equal shares to — and — and —.

No. 1071.

Entry setting aside Deed by Deceased made in Fraud of Creditors at Suit of Administrator.*[Caption.]*

This day this cause came on to be heard upon the pleadings and evidence (a jury being waived by the parties), and was submitted to the court. On consideration thereof the court finds that the deed as alleged in the petition made by the said A. D., deceased, to F. S., was made with intent to hinder, delay and defraud creditors of the said A. D., of all of which the said grantee, F. S., was fully aware at the time said conveyance was made to him; the court finds that at the time said deed was made by said decedent he was indebted to numerous persons as set forth in said plaintiff's petition.

It is therefore considered and adjudged by the court that the said deed so made by said — to the said — be and

the same is hereby set aside and annulled; and it is further ordered that the said administrator cause said premises described in his petition to be appraised upon the oaths of —, — and —, three disinterested freeholders of the county, and report the same to this court.

R. S. Sec. 6140.

FORECLOSURE OF LIENS.

No. 1072.

Decree and Order of Sale in Foreclosure.

[*Caption.*]

This day this cause came on to be heard on the petition of the plaintiff, the defendants and each of them having been duly and legally served with notice of the prior pendency of this suit, and each being duly and properly before the court, and each and all of the defendants being in default for answer and demurrer, and submitted to the court, and on consideration thereof the court do find that the allegations in the petition contained are by the defendants and each of them confessed to be true, and that there is due the said plaintiff from the defendant, T. F. R., on the promissory note set forth in the petition, with interest at the rate of — percent per annum, payable annually, computed to the first day of this term of court, the sum of (\$—) — dollars.

The court further find that in order to secure the payment of said note the defendants, T. F. R., J. A. R., his wife, executed and delivered to the plaintiff the mortgage deed in the petition described and on the premises therein described; and that said mortgage was duly recorded in Mortgage Record —, page —, in the recorder's office of — county, Ohio, and is the first and best lien on said premises, described in the petition, excepting the taxes thereon.

The court further finds that the condition of defeasance in said mortgage has been broken, and that the plaintiff is thereby entitled to have the equity of redemption of the said J. F. R. and others foreclosed. (*a*)

It is therefore considered, adjudged and decreed that unless the said defendants, T. F. R. and J. A. R., shall, within — days from the filing of this decree, pay or cause to be paid to the clerk of this court the costs in this case, taxed at

\$—, to the plaintiff the sum of \$—, with interest from the — day of —, 18—, according to the terms of said mortgage deed, that the said defendants' equity of redemption shall be foreclosed, and said premises shall be sold, and an order of sale shall issue to the sheriff of — county, Ohio, directing him to appraise, advertise and sell said premises as upon execution, and bring the proceedings into court for further order.

On motion, and for good cause shown, publication in German newspaper is hereby dispensed with.

No. 1073.

Decree in Foreclosure where Personal Judgment is rendered.

[*Caption.*]

[*Proceeding from (a) in last form No. 1072.*]

It is therefore considered by the court that the plaintiff recover from the defendant, T. F. R. [*or, where there may be several successive grantees who have assumed the debt, their names might be given as follows:* recover from the defendants, T. F. R., G. H. and E. F.], the said sum of \$—, so found due, together with his costs herein expended. It is also further ordered, adjudged and decreed that unless the defendant, T. F. R., shall, within five days from the entry of this decree, pay or cause to be paid to the clerk of this court the costs of this case, and to the plaintiff herein the sum so found due as aforesaid, with interest at the rate of — percent from the first day of this term of court, the defendant's equity of redemption be foreclosed, the said premises be sold, and that an order of sale issue therefor to the sheriff of said county, directing him to appraise, advertise and sell said premises as upon execution, and report his proceedings to this court for further orders.

No. 1074.

**Entry upon Petition, amendment thereto—Answer—Reply—
Other Defendants in Default for Answer—Ordering Sale in
Foreclosure.**

[*Caption.*]

This cause came on for hearing upon the petition and amendment thereto; and the answer of L. B. and the amend-

ment thereto, and the reply of the plaintiff thereto, and the answer of A. C. F. and N. C., and the reply of plaintiff thereto (the said D. S. B. being in default for answer and demurrer), and the evidence, and was submitted to the court. On consideration whereof the court find that the defendant, D. S. B., executed and delivered to the plaintiff, M. J. S., the mortgage deed in the petition described; that said mortgage was duly recorded in book —, page —, of the records of mortgages of — county, and is the first and best lien on the following proportion of the premises described in the petition, to wit: [*description of premises, although this is not essential*].

The court further find that the condition of defeasance in said mortgage has been broken, and that the said plaintiff is thereby entitled to have the defendant's equity of redemption foreclosed.* It is therefore considered and decreed by the court that unless the said D. S. B. shall, within five days from the entry of this decree, pay, or cause to be paid, to the clerk of this court the costs in this case, and to the plaintiff the sum of \$—, with interest from the first day of this term of the court, to wit: the — day of —, 18—, at the rate of — percent per annum, according to the terms of said mortgage deed, the defendant's equity of redemption be foreclosed, and said premises shall be sold, to wit: [*description if part only of premises described in petition be ordered sold*], and an order of sale shall issue therefor to the sheriff of — county, Ohio, directing him to sell said premises as upon execution, and bring the proceeds into court for further orders.

No. 1075.

Entry—Foreclosure—Continued from No. 1072 Finding Party not entitled to Personal Judgment.

[*Caption.*]

[*Following form ante No. 1072 down to (a).*]

And the court further find in favor of the said L. B., and that the said L. B. is not liable to the plaintiff for a personal judgment upon the matters and things set forth and claimed in the petition and amendment thereto, but the court do find that the said plaintiff is entitled to a foreclosure of said mortgage as to said undivided 48th part of said premises in the petition described, to wit: 122 $\frac{3}{4}$ acres of land, as against each and all of said defendants.

[*Proceed with form ante No. 1072 from (a).*]

No. 1076.

Hearing on Petition, and Answer and Cross Petition of Lienholders—Judgment upon Cross Petition, Decree making Finding upon Both—Postponing Question of Priority.

[Caption.]

This cause coming on now for hearing on the petition of the plaintiff and the cross petition of the defendant, The H. Building and Loan Association, and the evidence, the court find that the defendants, J. M. P. and C. P., are in default for answer or demurrer, and that the allegations of the petition are thereby confessed by them to be true, and that there is due to the plaintiff from the defendant, J. M. P., on the promissory note set forth in the petition, with interest to the date of this decree, the sum of — (\$—), and for this amount judgment is accordingly entered against them, judgment to bear eight percent interest until paid. The court further find that in order to secure the payment of said notes the defendants, J. M. P. and C. P., his wife, executed and delivered their certain mortgage as in said petition described; that said mortgage was duly recorded in book —, pages —, of the Record of Mortgages of — county, Ohio, and is a good and valid lien on the premises described in the petition, and that the conditions of said mortgage have been broken, and the court further find that there is due to the defendant, The H. Building and Loan Association, from the defendant, J. M. P., on the note set up in the answer and cross petition of the said defendant, The H. Building and Loan Association, including dues, interest and fines, up to but not including this date (—, 18—), the sum of —, and that to secure the payment of said note the defendants, J. M. P. and C. P., his wife, executed and delivered to the said The H. Building and Loan Association their certain mortgage as in the cross petition described, and on the premises therein described, being the same premises as described in the petition of the plaintiff; that said mortgage was duly recorded in book —, pages —, of the Records of Mortgages of — county, and is a good and valid lien on said premises for the amount so found due to the said The H. Building and Loan Association, as well as for the amount to become due on said note to said association, and that the conditions of said mortgage have been broken. It is therefore adjudged and decreed that unless said defendants, J. M. P. and C. P., shall, within — days from the entry of this decree, pay or

cause to be paid to the clerk of this court the costs in this case, and to the plaintiff and to the defendant, The H. Building and Loan Association, the sum so found due them as aforesaid, with — percent interest from the — day of —, 18—, the defendant's equity of redemption be foreclosed and said premises be sold, and that an order issue therefor to the sheriff of — county, Ohio, directing him to appraise, advertise and sell said premises as upon execution, and report his proceedings to this court for further orders. The questions of the priority of liens is postponed for determination to the further order of the court.

No. 1077.

Entry overruling Demurrer to Answer and Cross Petition, and Decree thereon.

[*Caption.*]

This day this cause came on to be heard upon the demurrer of J. C. W. to the answer and cross petition of H. & P., and was argued by counsel. On consideration whereof the court does overrule the same, to which the defendant, J. C. W., excepts; and thereupon the defendant, not asking to plead further, this cause came on to be heard upon the answer and cross petition of said H. & P., the court find that there is due to said H. & P. from said J. C. W. the sum of \$—, and that they did at the — term of the common pleas court of — county, Ohio, recover a judgment against said defendant, J. C. W., for the sum of \$—, and \$—, costs of suit, and that said judgment became a lien upon the premises described in the petition on the — day of —, 18—, as in their said answer and cross petition averred, and that the same is a valid subsisting lien on said premises.

It is therefore considered by the court that unless the defendant, J. C. W., shall within five days from the entry of this decree pay, or cause to be paid, to the said H. & P. the said sum of \$—, and to the clerk of this court the costs of this action herein, taxed at \$—, the said real estate shall be sold, and that an order of sale issue therefor to the sheriff of — county, Ohio, commanding him to appraise, advertise and sell said real estate as upon execution, and return his proceedings to this court for further order.

To which judgment and order of the court the said J. C. W. excepts.

No. 1078.**Appraisement set aside and New Appraisement ordered by Consent.**

[*Caption.*]

On motion of C. F. S., one of the defendants herein, and of the other parties herein consenting thereto, the sheriff of — county, Ohio, is hereby ordered to return the order of sale hereinbefore issued without further proceedings thereunder, and the appraisements under said order are likewise set aside and a new appraisement ordered.

No. 1079.**Entry setting aside Sale.**

[*Caption.*]

This cause now coming on for hearing upon the motion of defendant, H. G. D., to set aside the sale made herein by the sheriff on the — day of —, to E. R., and upon the offer of the said defendant, H. G. D., to bid for said premises the sum of \$—, and upon the evidence, the court, after full consideration and for good cause shown hereto, sustains said motion and orders that the said sale be and is hereby vacated and set aside. It is further ordered by the court that an alias order of sale for the said premises be allowed to be issued to the said sheriff.

No. 1080.**Entry by consent setting aside Appraisement and Sale.**

[*Caption.*]

This day this cause came on to be heard upon the motion of the defendant, J. C. W., to set aside the appraisement and sale heretofore made upon the orders of sale, issued herein —, 18—, of the said real estate in the petition described, and all the parties consenting thereto it is ordered that the said motion be sustained, and that the said appraisement and sale heretofore made upon the said order of sale be and the same are hereby set aside.

No. 1081.**Entry setting aside Sale in Foreclosure upon Motion of Purchaser.***[Caption.]*

This day this cause came on for hearing upon the motion of P. L., the purchaser at the sale heretofore, to wit, on the — day of —, 18—, under the order of sale issued herein, on the — day of —, 18—, to set said sale aside, and was argued by counsel and was submitted to the court. On consideration whereof the court find that said motion should be granted and said sale set aside. It is therefore ordered by the court that the said sale made under said order of sale to P. L. of the said real estate be and the same is hereby set aside and held for naught.

No. 1082.**New Appraisement ordered when Premises twice Offered, and Sale on time.***[Caption.]*

Upon motion of plaintiff (*or*, defendant), and it appearing to the court that the premises herein have been twice advertised and offered for sale, and remain unsold for want of bidders, it is ordered that the said sheriff cause a new appraisement to be made according to law, and that he thereupon under such new appraisement to advertise and sell said premises upon the following terms to wit: One third cash, one third in nine months from the day of sale, and the remaining third in eighteen months from the day of sale, the deferred payments to draw six percent interest, and to be secured by mortgage on the premises.

R. S. Sec. 5417.

No. 1083.**Entry determining Priorities—Ordering Distribution—Separate finding of Fact and Law—Notice of Appeal.***[Caption.]*

This day this cause came on further to be heard upon the question of the priority of liens and further and final distribution of the balance of the proceeds of the sale made

under the former order of this court, and the parties having submitted their allegations and proofs by request of counsel the court states its findings of facts and law separately as follows, to wit: The court find that the premises sold under said former order were conveyed by E. and E. D. to the said J. M. P. by deed dated —, A. D. 18—, and acknowledged and delivered —, A. D. 18—, at about — o'clock p. m. of said day, and recorded on the — day of —, A. D. 18—, and is recorded on page —, of vol. —, of the records of deeds of said county. On the — day of —, A. D. 18—, the said J. M. P. and wife executed and delivered to the said defendant, The H. Building and Loan Association, their certain mortgage deed as in its answer and cross petition described, and on the premises therein described, and which mortgage was duly filed for record on the — day of —, A. D. 18—, at — o'clock a. m., and said mortgage contained covenants of warranty in the following form, to wit: "And the said J. M. P. and C. P., his wife, for themselves and for their heirs, executors and administrators, do hereby covenant with the said H. Building and Loan Association, its heirs and assigns, that they are the true and lawful owners of the said premises and have full power to convey the same, and that the title so conveyed is clear, free and unincumbered, and further that they will warrant and defend the same against all claim or claims of all persons whomsoever." The mortgage given by said P. and wife to E. and E. D., to secure the notes afterwards assigned to plaintiff and sued on herein by the plaintiff was executed, acknowledged and delivered on the — day of —, A. D. 18—, and filed for record on said — day of —, A. D. 18—, at — o'clock a. m., and conveys the real estate sold under said former order of this court, but said notes and mortgages were given in renewal of two other notes given to said E. and E. D. for the balance due them from said P. on the purchase money for said real estate and secured by mortgage executed, acknowledged and delivered on the — day of —, A. D. 18—, and filed for record on said — day of —, 18—, at — o'clock p. m. The mortgage given to secure the note to C. M. O., described in his answer and cross petition herein, was executed, acknowledged and delivered on the — day of —, A. D. 18—, and filed for record on the — day of —, A. D. 18—, at — o'clock p. m., and conveys the real estate sold under said former order. All of said mortgages are executed in proper form. At the time of filing the mortgage from P. and wife to the said E. and D. on the — day of —, A. D. 18—, as aforesaid, the said D. had no actual

knowledge of the execution or filing of said mortgage of P. and wife to the said H. Building and Loan Association, but before the taking of the renewal notes and mortgage on the — day of —, 18—, they, the said D., as well as the said plaintiff, had actual knowledge of the existence and filing of said mortgage from said P. and wife to the said H. Building and Loan Association. There is due to the said plaintiff on the judgment heretofore rendered herein in his favor, with interest to this date, the sum of \$——. There is due to the said C. M. O. on his mortgage lien, including interest to this date, the sum of \$——. There is due to the said association on its mortgage loan for dues, interest and fines to this date, the sum of \$——.

The court finds as a conclusion of law from the foregoing facts that the said plaintiff has the first best lien on said real estate and is entitled to have his said mortgage satisfied first out of the proceeds of said sale. That the said C. M. O. has the second best lien on said real estate and is entitled to be paid second out of the proceeds of said sale, and the said defendant, The H. Building and Loan Association, the third best lien on said real estate, and is entitled to be paid third out of the proceeds of said sale. It is therefore ordered, adjudged and decreed that the sheriff of this county, out of the balance of the money in his hands arising from the sale of said real estate, pay first the costs that have accrued herein since the making of said order of confirmation, to wit, the sum of \$——.

Second, to the said C. C. P. the sum of \$——, in full of his mortgage lien on said premises.

Third, To the said C. M. O. the sum of \$——, in full of his mortgage lien on said premises.

Fourth, To the said defendants, The H. Building and Loan Association, the remainder of the proceeds of said sale, to be applied as a credit on the amount hereinbefore found due it. To all of which finding, order, judgment and decree the said defendant, The H. Building and Loan Association, by its counsel, excepts, and thereupon the said defendant, The H. Building and Loan Association, gave notice of its intention to appeal from the above order of distribution to the circuit court of this county, and the court fixed the amount of the bond for such appeal at \$——.

No. 1084.

Sale confirmed—Deed and Distribution ordered.

[Caption.]

This day this cause came on further to be heard, and thereupon on motion of plaintiff and upon his producing the report and return of the sheriff of the proceedings had and a sale made by him under the former order and decree of the court herein, and the court upon careful examination of the proceedings of said sale of and by said sheriff had and made, being fully satisfied, and it appearing that the same has been had and made in all respects in conformity to law and the former orders and decrees of the court; and the court being satisfied of the legality of such sale, it is therefore now by the court here ordered, adjudged and decreed that said proceedings and sale and the same are hereby in all things approved, ratified and confirmed. And it is further ordered and decreed by the court that said sheriff convey to the purchaser at said sale, F. H., by good and sufficient deed in fee simple, according to law, the land and tenements so sold to him. And said purchaser is hereby subrogated to each and all the rights of each and all the lienholders, plaintiffs and defendants herein, in and to said premises, in so far as they may be paid herein for the protection of his title, and a writ of possession be issued by the clerk of this court to the sheriff of this county is hereby adjudged and awarded to put said purchaser into the full, peaceable and quiet possession of said premises and to each and every part and parcel thereof.

And the court now coming to distribute the proceeds of said sale, amounting to \$——, finds, adjudges and decrees that the liens upon said premises, and now upon said fund, amount at this time to the sums hereinafter set forth respectively, and stand in the order of priority as hereinafter set forth, and should be paid accordingly, and said sheriff is therefore ordered and directed out of said fund to pay: first, the costs herein, taxed at \$——; second, the taxes and penalty due and unpaid, amounting to \$—— (or, and owing to B. F. upon his tax certificate herein set up, \$——); third, to the defendant, M. E., in satisfaction of his mortgage claim herein, the sum of \$——; fourth, to plaintiff, F. B., the sum of \$——, in satisfaction of his mortgage claim; fifth, to the defendant, M. E., the balance of said fund, amounting to the sum of \$——.

No. 1085.

Entry confirming Sale—Finding and Decrees on Answers and Cross Petitions of several Defendants against Principal Debtor, Defendant—And Distribution all in one.

[*Caption.*]

On motion of the plaintiff, and on her producing the return of the sheriff of the sale made under the former order of the court; and the court on careful examination of the proceedings of the said sheriff being satisfied that the same have been had in all respects in conformity to law and the order of the court, it is ordered that the said proceedings and sale be and they are hereby approved and confirmed. And it is further ordered that the said sheriff convey to the purchaser, C. W., by deed according to law, the property so sold, and the said purchaser is hereby subrogated to all the rights of the lienholders in said premises so far as they may be paid herein, for the protection of her title, and a writ of possession is awarded to put said purchaser in possession of premises. It is further ordered that the clerk cause satisfaction of the mortgages herein sued on to be entered on the records thereof in the office of the recorder of — county, Ohio.

And this cause coming on for further hearing upon the answer and cross petition of J. B. W., upon the first and second causes of action in the answer and cross petition of the — company, upon the answer and cross petition of G. H., and upon the answer and cross petition of J. H. W., and the said defendants, J. B. and R. B., being in default for reply, answer or demurrer thereto, the court finds that the allegations of each and all of said answers and cross petitions are by said defendants, J. B. and R. B., thereby confessed to be true, and the court further finds that there is due the defendant J. B. W. from the defendant J. B. on the promissory notes set up in his cross petition the sum of — dollars (\$—). It is therefore considered by the court that the said defendant, J. B. W., recover from his co-defendant, J. B., the said sum of \$—, with interest at — percent from —, 18—. And the court further finds that there is due to the defendant, the — company, from the defendant J. B., on the promissory notes set up in the first cause of action in its cross petition, the sum of — dollars (\$—). It is therefore considered by the court that the said defendant, the — company, recover from its co-defendant, J. B., the said sum

of \$—, with interest at — percent from —, 18—. And the court further finds that there is due to the defendant G. H., from the defendant J. B., upon the promissory note set up in his cross petition the sum of — dollars (\$—). It is therefore considered by the court that the said defendant, G. H., recover from his co-defendant, J. B., the said sum of \$—, with interest at — percent from —, 18—.

And the court further finds that there is due to the defendant, J. H. W., upon the promissory note set up in his cross petition the sum of — dollars (\$—). It is therefore considered by the court that the said defendant, J. H. W., recover from his co-defendant, J. B., the said sum of \$—, with interest at — percent from —, 18—.

And the court coming now to distribute the proceeds of said sale, amounting to — dollars (\$—), it is ordered that the sheriff, out of the money in his hands, pay the claims or liens upon said real estate as far as said sum of \$— will reach, in the following order, to wit:

1st. The taxes due upon said real estate.

2d. The costs of this action.

3d. To J. B. W., on his answer and cross petition, the sum of \$—.

4th. To the — company, on the notes and mortgage set forth in the first and second causes of action in its answer and cross petition, the sum of \$—.

5th. To the — company, on the notes and mortgage set forth in the third and fourth causes of action in its answer and cross petition, the amount, if any, to be hereafter determined by the court, if the same shall hereafter be determined by the court to constitute a valid lien upon the said real estate, the same being contested.

6th. To G. H., on his answer and cross petition, the sum of \$—.

7th. To the plaintiff, C. W., the amount heretofore found due her, with interest, to wit: the sum of \$—.

8th. To the defendant, J. H. W., on his answer and cross petition, the sum of \$—.

And this cause coming on for further hearing upon the cross petition of the defendant, the — company, the plaintiff, at her request, has leave to withdraw the demurrers to said cross petition heretofore filed, and has leave to answer the third and fourth causes of action in the cross petition of the — company within — days from the — day of —, 18—.

No. 1086.

Entry finding upon Answer and Cross Petition—Answer of Plaintiff thereto that there is no Lien—Notice of Appeal.

[*Caption.*]

This cause coming on for further hearing upon the third and fourth causes of action in the cross petition of the — company, and the answer of the plaintiff to said third and fourth causes of action; and the same was argued by counsel, upon consideration whereof the court finds that the allegations of the answer to said third and fourth causes of action are true, and the court further finds that the mortgage set forth in the fourth cause of action of the cross petition of the — company, does not constitute a lien upon the real estate therein described, and said mortgage is hereby ordered canceled of record.

To all of which the defendant, the — company, then and there excepted and gave notice of its intention to appeal this hearing to the circuit court of — county, Ohio. And the court fixed the amount of the appeal bond at — dollars.

No. 1087.

Entry ordering Liens on Real Estate transferred to the Fund arising from the Sale of the same—Also ordering the Funds to be deposited in Bank.

[*Caption.*]

This cause having come on for hearing, and all parties being present, and it being represented to the court that the real estate conveyed by plaintiff's alleged mortgage has been sold, all the parties to this action consenting thereto in open court, it is agreed by parties herein and ordered by the court that the proceeds, to wit: the sum of \$—— cash, derived from the sale of said premises, shall take the place of the real estate, and for this litigation shall be considered as such until the rights of the parties herein are determined, and that the real estate shall forever go acquitted and be discharged from any and all lien by virtue of any said alleged mortgage, and all rights of all and each of the parties herein are by the consent of the parties ordered transferred from the said real estate to the said proceeds arising from said sale thereof.

It is further ordered by the court, by like consent of all parties, that the proceeds of said sale shall be deposited with the — bank of C., subject to the joint order of J. W. N. and J. T. H., as attorneys, representing all parties interested or having claim upon said fund.

And it is further ordered, adjudged and decreed by the court, all the parties consenting thereto, that all the rights of the mortgage upon said premises and all the holders thereof, be and they hereby are transferred from the said real estate to the said fund arising from the sale thereof as aforesaid, and all questions between said parties are to remain unaffected as to their claim upon said proceeds, and the rights of said parties are to be hereafter adjudicated as to their right to participate in said proceeds, and said real estate is released from the lien and operation of said mortgage, and said mortgage is hereby ordered to be canceled of record, and the rights of all parties hereof to participate in the distribution of said fund are not to be affected by said cancellation of said mortgage further than that all their rights are transferred from said property to said fund. The said proceeds are not to become or to be considered as personal property, but for the purposes of this litigation the same is to be considered real estate, and as standing in lien and in place of said real estate.

No. 1088.

Mechanic's Lien—Foreclosure—Decree of Sale.

[*Caption.*]

This day this cause came on to be heard upon the pleadings, evidence and arguments of counsel; and the court upon careful consideration thereof finds upon the issues joined for the plaintiff; that there is due said plaintiff from the defendant, E. L., on account of the materials furnished and labor performed, as set forth in the petition, the sum of \$—; that on the — day of —, 18—, within four months after furnishing said material and performing said labor, the said plaintiff filed with the recorder of — county a duly verified statement of his said account, which said statement was by said recorder filed and recorded in Records of Mechanic's Liens of said county, volume —, page —; and that the same became upon the said — day of —, 18—, and is now a valid and subsisting lien on the premises described in the plaintiff's petition; and that the said plaintiff is entitled to have said lien foreclosed.

It is therefore considered, adjudged and decreed that the said plaintiff, W. M., recover from the defendant, E. L., the sum of \$—, together with his costs herein expended; and that unless the said defendant pays and satisfies said judgment on or before the — day of —, 18—, that an order may issue to the sheriff of — county, Ohio, commanding him to sell said premises as upon execution, and of his proceedings in the premises to make due return to this court. And as to all questions of priority of liens, and as to the several amounts due the other defendants to this suit, the cause is continued.

No. 1089.

Confirmation of Sale—Distribution—Short Entry.

[*Caption.*]

On motion of the plaintiff, and on his producing the return of the sheriff of the sale made under the former order of this court, and the court on careful examination of the proceedings of said sheriff being satisfied that the same have been had in all respects and conformity to law and the orders of this court, it is ordered that said proceedings and sale be and they are hereby approved and confirmed, and it is further ordered that said sheriff convey to the purchaser, W. S., good and sufficient deed according to law, the property so sold to him, and that said purchaser be and he is hereby subrogated to all the rights of the lienholders of said premises so far as they may be paid herein for the protection of his title and a writ of possession of his award to put the said purchaser in possession of said premises.

It is further ordered that the clerk cause satisfaction of the mortgage herein sued upon to be entered upon the record thereof in the office of recorder of — county, Ohio, to —.

And the court now coming to distribute the proceeds of said sale, amounting to \$—, it is ordered that the sheriff, out of the money in his hands, pay fully and first to the treasurer of this county the taxes, penalty and interest against said property, to wit, the sum of \$—; second, to the treasurer of said county the amount of their assessments remaining unpaid upon said premises, to wit, the sum of \$—; third, the costs herein, taxed at \$—; fourth, to the plaintiff, W. S., the balance of said money remaining in his hands, to wit, the sum of \$—, to be applied as a credit upon his judgment against the said defendant. There still remaining due to the said W. S. the sum of \$—, execution is awarded against the said defendant therefor.

No. 1090.

Entry confirming Sale—Ordering Deed—Subrogating Purchaser to Rights of Lienholders—Partial Distribution, etc.

[*Caption.*]

On motion of the plaintiff, and on his producing his return of the sheriff of the sale made under the former order of this court, and the court on careful examination of the proceedings of the said sheriff being satisfied that the same have been had in all respects in conformity to law and the orders of this court, it is ordered that the said proceedings and sale be and they are hereby approved and confirmed; and it is further ordered that the said sheriff convey to purchaser, E. M., by deed according to law, the property so sold, and the said purchaser is hereby subrogated to all the rights of the said lienholders in said premises, so far as they may be paid herein for the protection of her title. It is further ordered that the clerk cause satisfaction of the mortgages herein sued on to be entered on the record thereof, in the office of the recorder of — county, Ohio.

And the court coming now to a partial distribution of the proceeds of said sale, amounting to \$—, it is ordered that the sheriff, out of the money in his hands pay, first, to the treasurer of this county the taxes, penalty and interest against said property, to wit, the sum of \$—; secondly, the costs of this action, taxed at \$—; and it is ordered that the further distribution of the proceeds of said sale, and all questions as to the amount and priority of liens, be continued until the further order of this court.

No. 1091.

Entry of a Several Decree in favor of one Grantee who assumed Mortgage and is compelled to Pay Deficiency—For Recovery against several preceding Grantees who also assumed Mortgage for the Amount so paid—Payments to be made in the inverse order in which Premises were sold—Payment of such by any one to operate as a Satisfaction.

[*Caption.*]

This day this cause came on for hearing on the answer and cross petition and the amended and supplemental answer and cross petition of the defendant W. M., the separate

answers of the defendants S. C. and J. M., and a jury being waived, and no jury being demanded, was submitted to the court; on consideration whereof the court, being duly advised in the premises, find that all the defendants herein have been duly and legally notified of the filing of said answer and cross petition and said amended and supplemental answer and cross petition, and of the prayer of the same; and the court find that the defendants O. D., J. E. and C. E., and G. A., have failed to answer or demur to said answer and cross petition, or amended and supplemental answer and cross petition of the said defendant W. M., and that the facts stated and allegations therein set forth are confessed by them to be true; the court find, from the evidence adduced on the trial, that all the facts set forth in said answer and cross petition and said amended and supplemental answer and cross petition of this defendant, W. M., are true; the court finds, from the evidence, that said defendants O. D., J. M., J. E. and C. E., G. A. and S. C., assumed and agreed to pay the note and mortgage set forth in plaintiff's petition, and also mentioned in this defendant's said amended and supplemental answer and cross petition herein, and also the taxes and street assessments; and for the purpose and in the manner and form as set forth in said amended and supplemental answer and cross petition. The court further finds, from the evidence, that after the sale of said premises in this case, on foreclosure proceedings, and the application of the purchase money as set forth in said amended and supplemental answer and cross petition, there still remained unpaid to the plaintiff, I. K., on said mortgage, the sum of — dollars (\$—). The court further finds that afterwards, and on or about the — day of —, 18—, this defendant, W. M., paid to said plaintiff, I. K., the full amount of said balance, with interest, amounting at the time of payment to the sum of — dollars (\$—). The court finds from the evidence that said defendants, O. D., J. M., J. E. and C. E., G. A. and S. C., did not pay said note and mortgage, nor said balance, nor any part thereof, so remaining unpaid after the foreclosure of said mortgage as aforesaid; that by reason of said assumptions and agreements of said several defendants, as set forth in this defendant's said (amended and supplemental) answer and cross petition that this defendant, W. M., is entitled to be reimbursed for said balance so paid by him, and that he is entitled to recover from said defendants, O. D., J. M., J. E. and C. E., G. A. and S. C., said balance with interest so paid to said I. K., as aforesaid; and the court find that upon the payment by any one of the said defendants of said balance

so due this defendant, W. M., that such payment should operate as a satisfaction also of each and all the other judgments against the other defendants as hereinafter rendered, subject, however, to all rights of subrogation as hereinafter stated.

The court further finds that, as between said defendants, said balance should be paid by them in the inverse order in which the sale of the premises so covered by said mortgage was sold, and said mortgage assumed as set forth in this defendant's said (amended and supplemental) answer and cross petition, and that execution for the same should issue, first, against the said O. D., and upon a failure to collect the same from said O. D., that then execution should issue against the said J. M.; and upon a failure to collect the same from the said J. M., that then execution should issue against the said J. E. and C. E.; and that upon a failure to collect the same from said J. E. and C. E., that then execution should issue against the said G. A.; and that upon a failure to collect the same from said G. A., that then execution should issue against said S. C.

It is therefore considered, adjudged and decreed that the said W. M. have and recover from the said defendant, O. D., said balance, with interest, amounting to the sum of — dollars and costs herein expended, taxed at \$—. It is further ordered and adjudged by the court that this defendant, W. M., have and recover from the said defendant, J. M., said sum of — dollars and his costs herein expended, taxed at \$—. It is further ordered and adjudged that this defendant, W. M., have and recover from said defendants, J. E. and C. E., said sum of — dollars (\$—), and his costs herein expended, taxed at \$—. It is further adjudged and decreed that this defendant, W. M., have and recover from the said defendant, G. A., said sum of — dollars and his costs herein expended, taxed at \$—. It is further adjudged and decreed that this defendant, W. M., have and recover from said defendant, S. C., said sum of — dollars and his costs herein expended, taxed at \$—.

It is further adjudged and decreed by the court that before execution is issued against said J. M. on the judgment so rendered against him, execution shall first be issued and returned unsatisfied against said O. D. on said judgment so rendered against said O. D. It is further ordered that before execution shall issue against said J. E. and C. E. on the judgment so rendered against them, execution shall first be issued and be returned unsatisfied for want of goods or chattels, lands or tenements, against the said J. M. on the judg-

ment so rendered against the said J. M., and that all the property of the said J. M. shall first be exhausted before such execution shall issue against the said J. E. and C. E. It is further ordered that before execution shall issue against said G. A., that execution shall first issue and be returned unsatisfied against said J. E. and C. E., it is further ordered that before execution shall issue against said S. C., that execution shall first issue and be returned unsatisfied against the said G. A.

It is further adjudged and decreed by the court that the payment of any one of said several judgments so as above rendered against each of said defendants shall, as to this defendant, W. M., and in so far as his rights and interests therein are concerned, operate and be a payment and satisfaction in full of each and every other of said judgments so as above rendered against said several defendants; but each payment shall not prejudice the right of such defendant as may have paid said judgment, to be subrogated to all the rights and interests of the said W. M. under such of said judgments, against such of said defendants as assumed said mortgage after the defendant, so paying such judgment, parted with the title to the premises so covered by said mortgage.

No. 1092.

Decree modifying the former Decree requiring Premises sold in the Order sold by Grantor.

[*Caption.*]

This day came the parties, and by consent of all the parties herein it is ordered and adjudged that the decree heretofore rendered in this court in the case of A. S. against D. S., and being No. — upon the dockets and records of this court, be so modified as to require that in subjecting the premises therein described to the payment of the mortgage indebtedness therein set forth, so as to require that the proceeds of the premises sold to J. F. H. shall be first applied to the payment of said claim therein sued upon before the proceeds of the remaining portions of said premises shall be so applied.

R. S. Sec. 5354.

No. 1093.

**Modification of former Decree and ordering Real Estate sold in
Parcels, and Proceeds of Sale of first Parcel to be applied
on Claim first.**

[*Caption.*]

This day came the parties, and thereupon it is ordered that the decree of foreclosure and order of sale heretofore entered herein be amended so as to require that in the sale of said premises the same shall be sold in two parcels, to wit:

First parcel: [*here give description.*]

Second parcel: [*here give description of property.*]

It is further ordered that the proceeds of said first described parcel be applied to the satisfaction of the payment of the claim sued upon herein and now held by —, before any part of the proceeds of said second described parcel is so applied.

R. S. Sec. 5354.

No. 1094.

Entry of Foreclosure of Chattel Mortgage.

[*Caption.*]

This cause coming on to be heard upon the pleadings, evidence and arguments, was submitted to the court. On consideration thereof, and the court being fully advised, finds in favor of the plaintiff, and that there is due plaintiff, upon the note set up in the said petition, the sum of \$—, with interest at — from the date of this entry.

And the court further finds that in order to secure the payment of said promissory note the said defendant executed and delivered to said plaintiff his chattel mortgage upon the property described in the petition, and that said chattel mortgage was by the plaintiff duly filed with — on the — day of —, 18—, and from that date became a lien upon said property, and is now a valid and subsisting lien on said property, and that the plaintiff is entitled, by reason of the non-payment of said note, to have the said chattel mortgage foreclosed and the said property sold.

It is therefore ordered, adjudged and decreed that the said plaintiff recover from the said defendant the said sum of \$—, with interest from —, and that unless the said defendant shall pay to said plaintiff the said sum of

\$—— within —— days from the date of this entry, that the said property described in said petition, and upon which said mortgage set forth in said petition herein is a lien, be sold according to law, by the sheriff, and that the proceeds derived from such sale be applied to the payment of said plaintiff's claim, after payment of costs herein expended.

No. 1095.

Foreclosure of Mechanic's Lien.

[*Caption.*]

This day this cause came on to be heard upon the pleadings and evidence, and was argued by counsel and submitted to the court. On consideration thereof the court finds that there is due the plaintiff from the defendant, upon the account set forth in his said petition, for labor and materials performed and furnished by said plaintiff to and for said defendant, in the construction of the building upon the premises set forth and described in the petition, and belonging to the said defendant as owner, the sum of \$——; and the court further finds that on the —— day of ——, 18——, plaintiff served a copy of said account, duly sworn to as required by law, upon the said defendant; and that on the —— day of ——, 18——, said plaintiff filed a duly verified statement of his said claim with the recorder of —— county, Ohio, which was recorded in the Record of Liens of said county, in volume —, page —, and that said claim became from said date a valid and subsisting lien upon the premises described in plaintiff's petition, and that the plaintiff is entitled, by reason of the failure of said defendant to pay his claim, to have said lien foreclosed and the said premises sold.

It is therefore ordered, adjudged and decreed that plaintiff recover from the defendant the said sum of \$——, with interest from ——, and that unless the said defendant shall pay said sum of \$—— within —— days from the date of this entry, that the said lien be foreclosed and said premises sold by the sheriff according to law, and that the proceeds arising from sale be applied to the payment of said claim.

FRAUD—FRAUDULENT CONVEYANCES.

See also VACATION OF JUDGMENTS.

No. 1096.

Entry setting aside Deed for Fraud.

[*Caption.*]

This cause came on to be heard upon the petition, answer, reply and the evidence, and was submitted to the court; on consideration whereof the court finds that the defendant obtained the deed of conveyance set forth in said petition from the plaintiff by fraud and misrepresentation as alleged in said petition.

It is therefore considered and adjudged by the court that the deed of conveyance described in said complaint from the plaintiff to the defendant for the [*describe premises as in complaint*] be and the same hereby is vacated, set aside and annulled and declared of no force and effect. And that the plaintiff recover from the defendant his costs in the action, taxed at \$——.

No. 1097.

Order setting aside Conveyance to defraud Creditor, and Property ordered to be Sold—Action begun by one on behalf of other Creditors.

[*Caption.*]

This day this cause came on to be heard upon the petition and evidence adduced by the plaintiff, the defendants being in default for answer and demurrer, and the same being submitted to the court, the court finds that the allegations of the petition are confessed to be true. The court especially finds that on the —— day of ——, 18——, the defendant, P. M., was indebted to sundry creditors in various sums of money (among other these plaintiffs), and was on said date the owner in fee of the said premises hereinafter described; that on said date in order to hinder, delay and defraud his creditors, the said P. M. conveyed to G. K. and

caused said G. K. to convey to E. M., the wife of P. M., all of whom had full knowledge of the purpose and object of said conveyance in fee the following described premises: [*here give description of the property conveyed*].

The court further finds that said conveyances were made through the formalities of deeds with covenants of warranty and were without any valuable consideration therefor passing to the said P. M. from either of the said G. K. or E. M., and the court here declares said conveyance fraudulent and void. The court further finds that on the — day of —, 18—, the plaintiffs, B. & Co., in cause number —, wherein B. & Co. were plaintiffs and G. P. M., J. M. and E. H. were defendants, these plaintiffs recovered a judgment against the said defendants thereon, on their joint and promissory note, in the sum of \$—, together with interest at — percent from the date of said judgment, and their costs therein expended, taxed at \$—, which judgment is now in full force and unreversed and unsatisfied.

The court further finds that the said P. M. is insolvent except as to the premises hereinbefore described. The court therefore finds that there is due the plaintiff from said P. M. on the indebtedness in their petition described the sum of \$—, with interest as aforesaid, and costs as aforesaid; that this cause of action was brought by the plaintiffs under Section 6344 of the Revised Statutes of Ohio for their own benefit as well as for that of all the other creditors of said P. M. who might come into this cause and be made parties hereto to secure the payment of their *pro rata* share of the costs and expenses of the prosecution of this action and file their answer and cross petition herein, the said plaintiff having given the notice provided for in said section of the pendency and object of their said action by publication for four consecutive weeks in a newspaper published in said county, next after the — day of —, 18—.

The court further finds that the defendant, H. M. & Co., have been made parties hereto and filed their answer and cross petition herein on the — day of —, 18—, but have not given security for their share of the costs and expenses of the prosecution of this action, and the court finds that there is due from said P. M. to the said H. M. & Co. upon the causes of action set forth in their said answer and cross petition the sum of \$—, together with interest and costs as therein prayed for, and that H. M. & Co. have caused an execution to be issued and levied upon the real estate described in the plaintiff's petition, on the — day of —, 18—, and that after paying the claim of said plaintiff, the claim of

said H. M. & Co. is the next and first lien on said premises and should be paid out of the residue of the proceeds of the sale of said premises if any there be.

It is therefore here ordered, adjudged and decreed by the court that the said conveyances be and the same are hereby set aside; that said premises be sold and the proceeds arising therefrom be applied first to the payment of the claim of the plaintiff herein; second to the payment of the claim of said H. M. & Co., and that the residue, if any there be, be paid *pro rata* to such other creditors as may come in and prove their claim, after paying the costs of this action.

For the purpose of carrying into execution the findings and decrees of this court herein made, it is hereby ordered that an order of sale issue to the sheriff of this county, commanding him to appraise, advertise and sell as upon an execution at law the premises hereinbefore described and report his proceedings in the premises herein to this court.

R. S. Sec. 6344.

No. 1098.

Entry declaring certain Deed Not Fraudulent.

[Caption.]

This cause came on for hearing and was heard upon the pleadings, exhibits and testimony, and was argued by counsel and submitted to the court, and upon consideration thereof and being fully advised in the premises the court finds the issues joined in favor of the defendants and that the plaintiff is entitled to the relief prayed for in his petition.

And the court further finds that the deed made by the plaintiff, S. G., to the defendants, J. G. and J. M. G., dated the — day of —, 18—, and appearing of record in deed book —, page —, of the — county record of deeds, and referred to in the petition herein, was not procured by fraud as alleged in the petition, but, on the contrary, said deed when executed was the free and voluntary act of the plaintiff, and the same was and is supported by valuable consideration.

It is ordered that the petition of plaintiff herein be and the same is hereby dismissed at cost of the plaintiff, and it is adjudged that each and all of the defendants recover of the plaintiff their costs herein expended, taxed at \$—.

GUARDIAN'S SALE OF REAL ESTATE IN COMMON PLEAS COURT.

See OTHER ENTRIES IN PROBATE COURT.

No. 1099.

**Decree authorizing Guardian to sell Real Estate—Divesting
Widower of Dower Interest on Account of Waste—Appoint-
ment of Appraisers.**

[*Caption.*]

This day came the plaintiff by his attorney and on motion the court doth order that this cause be entered upon the trial docket of this term and assigned for hearing this day, and the same being so accordingly done, the defendant, E. H., still failing to demur or answer to the petition or otherwise plead thereto, and being in default therefor, this cause came on to be heard by the court upon the petition of plaintiff, answer of L. G. B., guardian *ad litem* for the minor defendant, M. V. H., T. H. and A. H. respectively, the answer of S. V. M. and J. W. S. by exhibits and testimony, and the court having fully and carefully considered the same, and being fully advised in the premises, doth find that each and all of the defendants have been duly and legally notified of the pendency and prayer of the petition according to law, and that the facts stated and allegations contained in the petition are true. The court do further find that as set forth the real estate in said petition described, and each parcel thereof, ought to be sold for the proper maintenance and education of said wards as prayed for in said petition, and that it will be for the best interests of said ward to sell said real estate and reinvest the money arising therefrom in loans upon mortgage.

The court do further find that the defendant, E. H., as widower of the said M. H. H., deceased, is or was seized of estate by curtesy or dower in said lot — containing as in said petition set out — acres of land and in said lot — containing as aforesaid — acres of land. The court further find that the said E. H. has neglected to pay or caused to be paid the taxes on said real estate aforesaid, notwithstanding

it was his duty so to do so long as each of said tracts have been sold for the payment of the taxes levied against the same, and that the said E. H. has not caused the same to be redeemed according to law, and that more than one year has elapsed since said tracts were so aforesaid respectively sold for taxes.

The court further finds that the said E. H. has wholly failed, neglected and refused to keep the buildings and fences on said premises in a proper condition, whereby great waste has been committed by said E. H. in this regard, and the estate of said wards has suffered from it. The court further finds that the said E. H. has by his negligence in regard to the proper payments by him of the taxes as aforesaid by his failure and refusal to make the needful, necessary and proper repairs on said premises, wholly forfeited to said wards, W. V. H., T. H. and A. H., who are the persons next entitled to said lands in remainder and reversion of all the estate which he, the said E. H., or may have had in said lands as aforesaid as by the statutes in such cases made and provided.

The court further find that the defendant, S. V. M., is or was the owner of the dower formerly held and owned by A. H. as widower of H. H., deceased, in the premises mentioned, and described as lot —, and containing— acres, and that the said A. H. did convey the same to the said S. V. M. by deed dated the — day of —, 18—, and recorded in the recorder's office of said — county, in deed book —, page —.

The court further find that the said S. V. M. has neglected to pay or caused to be paid the taxes thereon, notwithstanding it was his duty so to do so long as said — acre tract has been sold for the payment of taxes levied against the same; that the said S. V. M. has not caused the same to be redeemed according to law, and that more than one year has elapsed since said — acre aforesaid was sold for taxes, and find that the said S. V. M., by his negligence in the payment by him of the taxes as aforesaid on the said — acre of tract as forfeited to W. V. H., T. H. and A. H., who are the persons next entitled to the lands in remainder and reversion all of the estate which he, the said S. V. M., had or may have had in said land as aforesaid, as by the statute in such cases made and provided.

And it further appearing to the court by the answer filed herein of the said S. V. M. that he has waived all right, title and interest in said premises, and consents that the said premises may be sold free and clear of any dower right or claim that he has or may have had in the same.

It is therefore now here by the court ordered, adjudged and decreed that the dower interest of the said E. H. and S. V. M. in the premises described in the petition and in each parcel thereof respectively, be and the same are hereby declared forfeited, and the said dower interest or claim of the said E. H. and S. V. M. respectively in said premises by this decree be held for naught, forever cut off, made null and void and of no effect either in law or equity. It is further ordered and adjudged and decreed that the said E. H. and S. V. M. respectively shall and will, by good and sufficient deed in fee simple, according to law, immediately convey to the said M. V. H., T. H. and A. H., their heirs and assigns forever, all their and each of their right, title and interest of, in and to said premises, and upon their failure, or the failure of either so to do, then and forever thereafter this decree shall and will stand for and in the place of and instead of such conveyance or conveyances, so that they, the said M. V. H., T. H. and A. H., shall be invested and the said E. H. and S. V. M. divested of all right, title, interest and estate of, in and to the premises described in the petition, and heretofore held or claimed by the said E. D. or S. V. M., or either of them, in said premises or either parcel thereof.

It is therefore now further ordered that S. S., O. S. and N. H. G., three judicious and disinterested freeholders of this county, and not akin to the petitioners, be and are hereby appointed appraisers of said cause, and that they be sworn as required by law before entering upon the discharge of their duty as said appraisers; that said appraisers, upon actual view of the premises described in the petition, appraise the same at their fair cash value, free from the dower of the said E. H., and free from the dower of the said S. V. M., respectively therein, and that said appraisers make return of their appraisement and other doings to this court without unnecessary delay.

No. 1100.

Order of Court authorizing Guardian to sell Real Estate at Private Sale at not less than the Appraised Value.

[Caption.]

This cause coming on this day further to be heard, and it appearing to the court that the appraisement heretofore ordered has been made and confirmed by the court, that the said T. M. C., guardian, the plaintiff above named, has given bond in double the amount of said appraisement, with T. J.

R. and others as sureties, conditioned as provided by law, and which bond is approved by the court; that it has been made to appear upon satisfactory evidence to the court that it would be more for the interest of said wards to sell the lands described in the petition in this cause at private sale, it is therefore now here by the court ordered that the petitioner proceed to sell the lands in the petition described, free from the dower estate of E. H. and W. W. V. respectively, and that the petitioner may sell said lands at private sale at not less than at the appraised value thereof upon the following terms: one third cash, one third in one and one third in two years from day of sale, deferred payments to bear interest at — percent, and to be secured by mortgage on the premises sold, and that said petitioner make return of his proceedings herein without unnecessary delay.

No. 1101.

Confirmation of Guardian Sale and Deed Ordered.

[*Caption.*]

This day this cause came on to be heard upon the motion of the petitioner to confirm the sale made in obedience to the order heretofore made in this cause, and the court having carefully examined the proceedings of the petitioner upon said order of sale and finding them in all matters correct and being satisfied that said sale was fairly and legally made, it is ordered that the said sale be and it is hereby ratified, approved and confirmed, and it is further ordered that the petitioner make a deed of all the right, title and interest of the said M. V. H., T. H. and A. H., minors, in and to said land, to the purchaser, C. H. O., upon his executing to said guardian a mortgage upon the premises to secure the deferred payment of the purchase money, with — interest, payable —; and it is further ordered that the petitioner pay the cost of these proceedings, taxed at \$—, out of said money for which said land was sold, without unnecessary delay.

HABEAS CORPUS.

No. 1102.

Entry Granting Writ.

[Caption.]

This day came J. H. and made application to the court for a writ of *habeas corpus* for the production of the body of one —, now in the custody of the sheriff [*or*, now in the custody of —], and it appearing to the court that the writ ought to issue, the same is hereby granted, returnable on the — day of —, 18—, at — o'clock — M.

R. S. Secs. 5727, 5730.

No. 1103.

Entry Refusing allowance of Writ.

[Caption.]

This cause coming on to be heard upon the petition and application of J. H. for the allowance of a writ of *habeas corpus* on his own behalf, and it appearing to the court that the said J. H. is restrained of his liberty by the sheriff of — county under process issued by the — court of — county [*or*, by C. D., justice of the peace], and that said court [*or*, justice] had jurisdiction to issue said process, the said writ is therefore refused.

Whittaker's Civil Code, Sec. 5729. This may be easily modified if the custody of a minor is sought by following the statute. Kinkead's Code Pleading, Sec. 659.

No. 1104.

Entry Continuing Cause and Remanding Prisoner.

[Caption.]

For good cause shown to the court it is ordered that the hearing of this cause be and the same is hereby continued to

—, 18—. It is ordered that the said C. D., petitioner, be remanded to the custody of the sheriff until the final hearing of said cause.

R. S. Sec. 5740.

No. 1105.

Entry of Continuance when Custody of Minor involved.

[*Caption.*]

For good cause shown to the court, it is ordered that the hearing of this cause be and the same is hereby continued to —, 18—. And it is further ordered that the said A. C. be committed to the care and custody of — until the final hearing hereof [*or*, that the said A. C. remain in the custody of the respondent until the final hearing of this cause].

R. S. Sec. 5740. Kinkead's Code Pleading, Sec. 655.

No. 1106.

Entry awarding Custody of Child upon Final Hearing.

[*Caption.*]

This day this cause came on to be heard and was submitted to the court upon the pleadings, exhibits, testimony and argument of counsel. Upon consideration thereof, and the court being fully advised in the premises, finds that there was no express agreement between the parties hereto to surrender the custody of the child, K. M., from the plaintiff to the defendant, but that there was an implied understanding from the fact that said child was permitted to remain in the custody of the defendant for a period of about — years; that the custody of said child was given by the plaintiff to the defendant.

The court further finds that the plaintiff is a competent person and well qualified to maintain, rear and educate such child, and that he can furnish a good home for it; that the best interest and welfare of such child will be subserved by refusing the prayer of the petition herein, and by continuing said custody, care and control of said infant child in the defendant, N. L.

It is therefore ordered, adjudged and decreed by the court that the care, custody, control, maintenance and education of said infant child, K. M., be and the same are hereby adjudged and decreed to remain in the defendant, N. L.

And it is further ordered and adjudged that the defendant do have and recover from plaintiff her costs hererein expended, taxed at \$——, and execution is awarded therefor.

No. 1107.

Entry remanding Prisoner to Jail on Final Hearing—Motion for Rehearing overruled.

[*Caption.*]

Now comes the sheriff of —— county, Ohio, and made return of the writ of *habeas corpus* heretofore issued in this case, and also brought the body of said J. J., petitioner herein, and upon the hearing of the case the court finds that the said J. J. is lawfully imprisoned and held in custody by the sheriff of —— county, Ohio, and the petition of said J. J. is therefore dismissed.

It is therefore ordered that the said J. J. be remanded back into the custody of the said J. R., sheriff of said —— county, Ohio, to be detained as heretofore by virtue of said *mittimus* named in said petition of J. J., and that he pay the costs of this proceeding, taxed at \$——, and to all of which orders, findings and judgment of the court the said J. J. at the time excepted and still excepts.

Thereupon within three days the said J. J. filed a motion for a rehearing of his petition and said motion the court overruled, and to which judgment the said J. J. excepts, and forty days given said J. J. in which to prepare, present and have allowed his bill of exceptions herein. And this day came said J. J. and filed in the office of the clerk of said court his bill of exceptions below allowed and signed by the court, and which is ordered by the court to be made part of the record, but not to be spread at large upon the journal.

R. S. Sec. 5729.

No. 1108.

Entry remanding the Prisoner to Custody of ——.

[*Caption.*]

This application coming on for hearing upon the return of the —— and the evidence, was argued by counsel and submitted to the court, and upon due consideration whereof the court finds that the prisoner is lawfully in the custody of said ——, and therefore dismisses the application and remands the relator to such custody.

No. 1109.

**Entry on final Hearing as to Custody of Child, remanding
Custody to Respondent.**

[*Caption.*]

This day this cause came on to be heard upon the pleadings, evidence and was argued by counsel. On consideration whereof, and the court being fully advised in the premises, finds that the best interests of the child, T. C., demand that she remain in the custody of her father, and that he is a suitable person to have the custody of said child.

It is therefore adjudged, ordered and decreed that the said T. R. be remanded to the care and custody of the said A. L. C., that the petition herein be dismissed. It is further ordered that said petitioner, W. R. B., pay the costs of this proceeding, taxed at \$——, to all of which finding and judgment said petitioner by his counsel excepts.

INFANTS.

See PARTIES.

No. 1110.

**Infancy—Order setting aside Deed made by an Infant—Also
Mortgages, encumbering Infant's interest included in said
Deeds—Holding Assignees of Notes before Maturity bona fide
Holders.**

[*Caption.*]

This day this cause came on to be heard upon the demurrers of the defendants W. D. D., E. H. H., administrator of J. H., deceased, to the petition, was argued by counsel and was submitted to the court. Upon due consideration whereof the court overrules the same, and thereupon the said defendant W. D. D., and E. H. H., as administrator, not taking leave to further plead herein, and the defendant M. H. being in default for answer or demurrer to the petition, in this cause came on for trial upon the petition of the plaintiff, the amended answer and cross petition of —— company and the answer and cross petition of —— company, and the evidence, was argued by counsel, submitted to the court, and

upon due consideration whereof the court doth find for the plaintiff F. H. ; that she was at the time of the execution of her quit-claim deeds to J. H. in the petition described, dated the — day of —, 18—, and the — day of —, 18—, respectively, recorded in the — book, — pages, county records, for the premises in the petition described, to wit: [*Description of premises*], a minor under the age of eighteen years, and is entitled to have the said quit-claim deeds from her, the said F. H., canceled and held for naught as against her in so far as the same purports to convey from her the undivided one half interest in said premises because of her said infancy at the time of the execution of the same; and is further entitled to have the deed in the petition described, from J. H. and M. H., his wife, to W. D. D., dated the — day of —, 18—, and recorded in deed book —, pages — and —, so far as the same purports to convey her one half interest, set aside and held for naught as against her; and is further entitled to have the mortgage deed from W. D. D. to J. H., dated the — day of —, 18—, and recorded in mortgage record —, pages — and —, set up herein by the defendants, the — company, and — company, set aside as against her in so far as the same purports to convey mortgage deed encumbered the undivided one half interest of her, the said F. H., in said premises, and the court finds that the said W. D. D. is and was on the — day of —, 18—, when he executed and delivered said notes and mortgages to said J. H., the owner in fee simple of the undivided one half of said real estate, with full power to sell, convey, mortgage and encumber his said undivided one half, and that said mortgage is a valid and subsisting lien upon his, the said W. D. D., undivided one half of said premises. As to all questions relating to rents and profits the court reserves its judgment and decree for further consideration.

It is therefore adjudged and decreed that the following deeds and mortgage be and the same are hereby set aside and held for naught as against the said F. H. in so far as the same purports to convey or encumber her undivided one half interest in said premises in the petition and hereinbefore described, to wit:

1. The quit-claim deeds from S. H. to J. H., dated the — day of —, 18—, and the — day of —, 18—, respectively, recorded in deed book —, pages — and —, of the — County Records.

2. The warranty deed from J. H. and wife to W. D. D., dated the — day of —, 18—, and recorded in deed book —, pages — and — County Records.

3. The mortgage from W. D. D. to J. H., now claimed to be held by the defendants, the — company, and the — company, dated the — day of —, 18—, and recorded in Mortgage Record —, pages — and —, — County Records, in so far as the same, his deed, purports to be a lien upon her said undivided one half of said real estate. But it is ordered, decreed and adjudged that said mortgage be and remain a lien upon the other undivided one half of said real estate.

And the court doth further find, upon the cross petition of the said — company and — company, that said notes in their said cross petition respectively set forth, were taken and received by them respectively before maturity thereof *bona fide* for value in the usual course of business and without notice of any defense to the same or either thereof or to the mortgage securing the same in favor of any person whomsoever, and that there is justly owing thereon from said W. D. D. to the said — company and — company, and remaining wholly unpaid, the sums by them respectively in their cross petitions set forth and claimed, and with interest as named by them, to wit: To said — company, on said one-year note, the sum of \$—, and on said — note the sum of \$—, and to said — company on said note the sum of \$—, and on said — note the sum of \$—, with interest on each and all of said notes and on amounts aforesaid owing, with interest at the — percent per annum from the — day of —, 18—, payable annually.

And the court further finds without now deciding or determining any questions of priority or preference or other questions made by or between said — company and — company, all of which are reserved for future consideration, that said two companies are likewise the lawful owners and holders of the mortgage aforesaid so far as the same as hereinbefore held valid, viz.: to the extent of the undivided one half of said real estate described in the petition for the protection, security and payment of said notes and each of them by them respectively held and owned as aforesaid.

And it is hereby ordered, considered and adjudged by the court that said W. D. D. pay or cause to be paid the notes as aforesaid, and interest as aforesaid, to the parties aforesaid now holding and owning the same respectively, or their assigns, when and as they respectively fall due as aforesaid according to the terms of said notes, and that the same be and remain a lien upon the said undivided one half of said real estate described in said petition, to which said W. D. D. has title as hereinbefore found.

INJUNCTION.

See also ASSESSMENTS.

(*R. S. Secs. 5571—5586.*)

No. 1111.

Entry granting temporary Restraining Order—(To prevent Sale or Incumbrance of Real Estate) without Notice.

[*Caption.*]

This day this cause came on for hearing upon the petition, motion and affidavit of plaintiff for a temporary restraining order as prayed for in the petition; (and for good and satisfactory reasons notice of this application is dispensed with), and it being made to satisfactorily appear to the court, by the affidavit of plaintiff [*other persons, if necessary*] that said plaintiff is entitled to a temporary restraining order as prayed for in his said petition, does hereby grant and allow a temporary restraining order, as prayed for by said plaintiff in his said petition, and upon the plaintiff entering into a bond in the sum of \$——, with sureties to be approved by the clerk of this court, the said defendant is hereby restrained until the further order of this court [*here insert in the language of the prayer of the petition, as*] from selling, encumbering, or in any way disposing of the following described real estate, to wit: [*Description*].

R. S. Secs. 5574, 5575.

No. 1112.

Entry directing reasonable Notice to Defendant before hearing.

[*Caption.*]

This day this cause came on for hearing upon the petition and application of plaintiff herein for a temporary restraining order as prayed for in said petition, and it being the opinion of the court that the defendant herein should have notice

hereof, and that he should have an opportunity to be heard before granting the injunction prayed for, it is ordered by the court that said plaintiff cause a reasonable notice to be given to said defendant of the time, place, and purpose of said application, by giving said defendant not less than — days' notice hereof, and that said application be set for hearing on the — day of —, 18—, at — o'clock —. M., and until further ordered by the court, and until the decision of the application for an injunction, a restraining order is allowed, restraining said defendant from [*state acts to be refrained from*], upon the plaintiff's entering into an undertaking with sureties to be approved by the clerk of this court in the sum of \$——.

R. S. Secs. 5574, 5575.

No. 1113.

Entry granting Rule to show Cause why Defendant should not be Punished as for Contempt for Violation on Injunction.

[*Caption.*]

Upon motion of plaintiff, and the court being satisfied by the affidavit of (plaintiff or any other person) that the said defendant has been guilty of a breach of the restraining order (or injunction) heretofore granted herein, it is by the court ordered that (a) a rule issue requiring said defendant to appear before this court on the — day of —, 18—, and show cause why he should not be punished as for contempt in so violating the said restraining order of this court.

(*Or if writ of attachment is ordered issued, from (a), a writ of attachment issue, directed to the sheriff of this county, commanding him to bring the body of the defendant into court.*)

R. S. Sec. 5581.

No. 1114.

Entry upon hearing of Charge for Violation.

[*Caption.*]

This day this cause came on for hearing upon the rule hereinbefore issued, requiring the defendant to appear and show cause why he should not be punished as for contempt for the violation of the temporary restraining order allowed herein, and the court having heard the examination of said

defendant concerning his said alleged violation of said order, and the other evidence adduced, and the arguments of counsel, finds upon consideration thereof that the defendant has been guilty of violating the said restraining order as alleged, and is guilty of a contempt of this court.

It is therefore ordered and adjudged by the court that the said defendant pay a fine in the sum of \$——, and the costs of this proceeding, for which the court awards execution.

R. S. Sec. 5581.

No. 1115.

Entry requiring Additional Security to be given upon Motion of Defendant.

[*Caption.*]

Upon motion of defendant, and it appearing to the court that due and proper notice has been given to the plaintiff thereof, and that the security heretofore given by plaintiff herein for the allowance of the temporary restraining order herein, it is ordered that unless the said plaintiff shall enter into an additional undertaking in the sum of \$——, with sureties to the satisfaction and approval of the clerk of this court, within — days from the date of this entry, the said temporary restraining order heretofore granted herein shall stand dissolved and held for naught.

R. S. Sec. 5582.

No. 1116.

Injunction—Temporary Restraining Order (in Divorce) so Modified as to allow Part of Real Estate to be Encumbered.

[*Caption.*]

This day this cause came on to be heard on the order of the court heretofore entered herein requiring the defendant herein not to dispose of nor encumber certain real estate described in the petition, and it appearing to the court that said restraining order ought to be modified, it is, upon due consideration, hereby ordered that said restraining order be and the same is hereby so modified as to allow the defendant to encumber — acres of said real estate for \$——, \$—— of which sum shall remain in the hands of the mortgagee until the final adjudication of this case (divorce) on its merits.

No. 1117.

Injunction—Entries Enjoining for Breach of Contract in Restraint of Trade.

[*Caption.*]

On motion of plaintiff, by his attorney, and good cause being shown therefor, it is ordered that on an undertaking being given in the sum of \$——, with sureties to the approval of the clerk, an injunction be allowed to issue herein enjoining said defendant from soliciting, personally or otherwise, as respects the horse-shoeing business, patronage, trade and custom of the public generally within ten squares of the blacksmith shop situated on —— street, Ohio, known by the street number —, either for himself or for the defendant's shop on —— street, between —— and —— streets in said city and in the petition described, or for any one who may transact business herein, and from soliciting, personally or otherwise, the patronage, trade or custom in the horse-shoeing business of any and all persons who formerly transacted business and dealt with him at said —— shop and who now transact business —— said —— shop with plaintiff, and from further fitting up and opening said shop on —— street or any shop within ten squares of said —— street shop for the purpose of shoeing horses or engaging directly or indirectly in the horse-shoeing business or from engaging in, conducting and continuing said business at said shop or at any point within ten squares of said —— street shop, or from renting said —— street shop or any other shop within ten squares of said —— street shop to any person or persons whatsoever, or for himself for the purpose of conducting therein a horse-shoeing business in any of its several branches for the period of — years from the — day of ——, 18—, until further order of this court.

No. 1118.

Entry of Perpetual Injunction in Restraint of Trade.

[*Caption.*]

This day this cause came on to be heard on the pleadings, evidence, and exhibits, and was submitted to the court, and on consideration thereof the court finds that the facts and allegations in the petition contained are true, and that the plaintiff is entitled to the relief prayed for.

It is therefore adjudged and decreed that the injunction heretofore granted in this action be and the same is hereby made perpetual; that the defendant be and he is hereby enjoined from soliciting personally, or otherwise, in reference to the horse-shoeing business for himself and said shop, or for anyone who may transact business therein, the patronage, trade, and custom generally within ten squares of said — street shop, and of persons who formerly transacted business and dealt with him at said — street shop, or who now transact business at said shop, and with plaintiff; that he be enjoined from further fitting up and opening said shop on — street, or any shop within ten squares of said — street shop, and from directly or indirectly engaging, conducting, and continuing said horse-shoeing business at said shop, or at any shop within ten squares of said — street shop, known as number — on — said street, or from renting said — street shop, or any other shop within ten squares of said — street shop, to any person or persons whatsoever, or for himself, for the purpose of conducting therein a horse-shoeing business in any of its several branches.

It is further ordered and adjudged that the plaintiff recover his costs expended herein and taxed at \$—, and the defendant is adjudged and ordered to pay the same.

No. 1119.

Same continued—Application for Proceedings in Contempt of Court—Rule Issued.

[*Caption.*]

This day this cause came on to be heard on the written application and charges of plaintiff against defendant, alleging that the said defendant is guilty of contempt of court in that he has, since the granting of the injunction and restraining order herein, engaged in, continued and still continues to engage in and conduct and continue the business of horse-shoeing at number — on — street in said city of C., Ohio, and within ten squares of the shop on — street, known as number —, and in the petition and restraining order heretofore granted and described herein, and has shod horses of divers persons in said application mentioned, and is soliciting trade and patronage of the public generally within ten squares of said — street shop, and the trade and custom of those dealing with plaintiff at said — street shop, since the issuing of the said order, and threatens to continue his said busi-

ness at said place, and to solicit horse-shoeing business within said territory lying within ten squares of said — street shop and disregard the orders of said court, and to continue the said business and soliciting in violation to and to the prejudice of the plaintiff's rights.

It is ordered that summons issue directing the defendant to appear before this court on the — day of —, 18—, at — o'clock — M., to show cause why he should not be punished for his contempt.

No. 1120.

Injunction against Use of Name.

[*Caption.*]

This day this cause came on to be heard upon the pleadings and evidence, and the same having been argued by counsel and submitted to the court, and the court being fully advised in the premises, doth find the issues herein joined for the defendants, and that the defendants are entitled to the relief prayed for.

It is therefore considered, ordered, and adjudged by the court that the injunction heretofore granted in this suit to the said defendants and against said plaintiff be and it is hereby made perpetual, and it is therefore considered and decreed that the said plaintiff, J. M. M., be and he is perpetually enjoined from using the words "Wholesale and Retail Implement Company," or either of them, in connection with his own name in his business. And it is further ordered and adjudged, on motion of defendants, that the previous injunction heretofore granted the said plaintiff against the said defendants be and the same is hereby dissolved and held for naught.

It is further considered and ordered that the said defendants recover of the said plaintiff their costs herein expended, taxed at \$—.

And thereupon notice of appeal was given by the plaintiff and the appeal bond is fixed in the sum of \$—.

No. 1121.

Entry declaring Law under which Assessments made Unconstitutional—Assessments invalid—To be Stricken from Tax Duplicate—Granting Perpetual Injunction against their Collection.

[*Caption.*]

This day this cause came on to be heard on the petition, the defendants and each of them having duly entered their appearance herein, and each and all of them being in default for answer and demurrer, and was submitted to the court, and upon due consideration whereof the court doth find that the plaintiff is the owner of and seized in fee simple of the premises in the petition described, having a frontage of — on the — street, extending from — to — in said city. The court doth further find that the amount of the assessment charged against plaintiff's property, as determined by the said O. E. D. B., as county treasurer of said county, for the making of the improvement in the petition mentioned in front of and along his premises, is, at the date hereof, \$—; that the allegations in the petition, and each and every of them, are true, and that the said act of the General Assembly, passed —, 18—, and the amendments thereto of —, 18—, controverts and is in violation of Sec. —, of Art. —, of the constitution of the state of Ohio, in that said act is a law of a general nature, but has no application, and can have no application to any county in said state other than — county; that said improvement is not yet completed and can not be completed by reason of the judgment and decree rendered in the proceedings in the petition mentioned by the said —; that said assessment, and each and every part thereof, made for the construction and by reason of the improvement in the petition mentioned, is illegal, null, and void, and does not constitute a lien upon the premises of plaintiff, or any portion thereof, and that the plaintiff is entitled to have the same stricken from the tax duplicate of said county, as a lien against his premises, and to have his said premises wholly relieved from the operation thereof, and that she is entitled to a permanent and perpetual injunction as prayed for in the petition.

It is therefore considered, adjudged and decreed that the defendants, S. B. B., J. B. M., and G. W. B., and each of them, as commissioners of said county of —, O. E. D. B., as treasurer of said county, and W. H. H., as auditor of said county, and each of them, be and are hereby perpetually

enjoined from demanding and collecting from the plaintiff on her said property any portion of the aforesaid assessment, or of the interest thereon, and the said defendants and each of them are hereby directed to strike from the tax duplicate of said — county the amount so charged and assessed against her premises, and are directed to cancel the same as a lien against said premises; that said treasurer be and he is hereby directed to accept the taxes legally due on his said premises; that the defendants and each of them are perpetually enjoined from asserting any lien on said premises by reason of said improvement.

No. 1122.

**Nuisance—Entry of Decree enjoining Perpetual Commission
of a Nuisance.**

[*Caption.*]

This day this cause came on to be heard on the pleadings and the evidence adduced by the parties, was argued by counsel and submitted to the court. On consideration whereof the court finds that defendants have been and are discharging sewerage, filth and waste water upon plaintiff's premises, and said discharge of sewerage, filth and waste water constitutes a private nuisance upon plaintiff's premises near his dwelling house. The court further finds that the plaintiff is entitled to a restraining order restraining the defendants, their agents and servants from creating this nuisance on plaintiff's premises.

It is therefore adjudged and decreed that the defendants and each of them be and they are each and all hereby perpetually enjoined and restrained from causing or permitting sewerage or filth or waste water from said sewerage, or from any other source under their control, to flow or empty on the land of plaintiff aforesaid, or into plaintiff's open branch or ditch, or otherwise causing or permitting filth or sewerage or waste water from their said premises to be dumped or discharged upon or so near plaintiff's premises as to be a nuisance thereto, or from increasing by artificial means the natural flow of water in said open branch or ditch.

It is further adjudged that the plaintiff recover from the defendants his costs herein, taxed at \$—, to which rulings, orders and decrees of the court the defendants except and forthwith filed their motion for a new trial, and thereupon at the same time said motion was argued and submitted to the

court, and upon consideration thereof the court overrules said motion, to which ruling and order the defendants except.

No. 1123.

Entry allowing Mandatory Injunction against Nuisance.

[*Caption.*]

This day this cause came on to be heard upon the pleadings, the evidence, the arguments of counsel, and was submitted to the court. On consideration whereof the court finds that the defendant in the operation of its garbage plant is creating a nuisance, and in the creation of such nuisance there is cast upon the plaintiff's land and into and about his dwelling, noxious odors, vapors and gases, causing material inconvenience and discomfort to him and his family. The court further finds that the plaintiff is entitled to an injunction restraining the defendant from operating its said garbage plant so as to cause offensive and noxious vapors and gases to be cast upon plaintiff's premises in the petition described, and into and about his said dwelling. It is therefore ordered, adjudged and decreed by the court that an injunction be and the same is hereby granted, restraining the defendant from operating its plant so as to create, or caused to be cast upon the land of the plaintiff, in the petition described, any offensive or noxious odors, vapors or gases, or into or about the dwelling of plaintiff from and after — day of —, 18—.

This date, to wit, —, 18—, is named and fixed by the court in order to enable the defendant between the date of this judgment and the said — day of —, 18—, if it desires so to do, avail itself of the means and agencies within its power to prevent said nuisance. If, however, it shall be made to appear to the court that the defendant does not propose or intend in good faith to make use of the proper means and agencies to prevent said nuisance, said injunction shall be and become operative from and after the day of this entry. The costs incurred in this case, taxed at \$—, are hereby adjudged taxed and assessed against the defendant.

No. 1124.**Entry Finding for Defendants, and Dissolving Temporary Restraining Order.**

[*Caption.*]

This case came on to be heard upon the pleadings and the evidence, and was submitted to the court, and upon due consideration thereof the court finds on the issues joined in favor of the defendant.

It is therefore considered, ordered and adjudged by the court that the temporary restraining order heretofore allowed herein be and the same is hereby dissolved, and that the plaintiff's petition and the answer and cross petition of G. D. J. be and the same is hereby dismissed.

No. 1125.**Entry of General Finding for Defendant—Dissolving Injunction—Notice of Appeal to Circuit Court—Bond.**

[*Caption.*]

This day this cause came on to be heard on the issues joined, the exhibits, testimony, and the same having been argued by counsel, was submitted to the court. Whereupon the court doth find upon said issues in favor of the defendant and against the plaintiff.

It is therefore considered, ordered, adjudged and decreed that the temporary restraining order heretofore allowed herein, be and the same is hereby dissolved.

Thereupon the plaintiff gives notice of his intention to appeal this cause to the circuit court of — county, Ohio, and for that purpose the court fixes the amount of the appeal bond at the sum of \$—, to be given by plaintiff, with sureties to the acceptance of the clerk of this court, conditioned according to law.

No. 1126.**Demurrer Sustained—Temporary Restraining Order Dissolved—Petition Dismissed.**

[*Caption.*]

This day this cause came on to be heard upon the demurrer to the petition, was argued by counsel and submitted

to the court; upon consideration thereof the court finds said demurrer well taken, and that said petition does not state facts sufficient to constitute a cause of action against the defendant.

It is therefore ordered and adjudged that said demurrer be and the same is hereby sustained, and that the temporary restraining order heretofore allowed herein be and the same is hereby dissolved, and that said petition be and the same is hereby dismissed, and that the defendants recover their costs herein expended.

INTERPLEADER.

(*R. S. Secs. 5016—5018.*)

No. 1127.

Order for Interpleader.

[*Caption.*]

It appearing to the court by the affidavit of the defendant that G. C. and D. C. make claim to the subject of this action, and that he, the said defendant, is ready to dispose of the same as the court may direct, it is ordered that the said defendant, under the former order of the court in regard to the same, retain the stock and money, the subject of this action, and it is ordered that the said G. C. and D. C. within ten (10) days from the service of this order appear and maintain or relinquish their said claims to the subject of this action, and that in default thereof they be forever barred from all claims thereon.

R. S. Sec. 5016.

No. 1128.

Entry of Interpleader—Directing Money to be Paid into Court.

[*Caption.*]

This day this cause came on for hearing upon the petition and affidavit of the defendant for an order of interpleader, and it appearing therefrom that one D. S. makes some claim to the money (*or*, property) herein sued for, and

the court being satisfied that said claim is so made by the said D. S. without collusion on the part of the defendant, A. C., and the said A. C. being ready to pay the money sued for herein (*or*, being ready and willing to dispose of the property involved herein), as the court may direct, it is ordered that, upon payment by the said defendant A. C. of said sum of \$——, the amount claimed by plaintiff in his petition, with interest from ——, 18——, subject to the further orders of this court, within —— days from the date of this entry, he shall be discharged from all liability to either plaintiff or the said D. S. with respect thereto. It is further ordered by the court that the said D. S. appear before this court on or before the —— day of ——, 18——, and maintain whatsoever claim he may have to said money, or relinquish the same, and that a copy of this order be served upon the said D. S. according to law.

R. S. Sec. 5016.

No. 1129.

Entry of Interpleader directing Property to be delivered to Receiver appointed by the Court.

[*Caption.*]

This day this cause came on to be heard by the court upon the petition and the affidavit of the defendant for an order of interpleader, and it appearing therefrom that one D. S. makes some claim to the property mentioned in plaintiff's petition, and in the possession of said defendant, and the court being satisfied that said claim is made by said D. S. without collusion on the part of the defendant, A. C., and the said A. C. being ready and willing to deliver said property to such person as the court may direct, it is ordered by the court that O. P. be and he is hereby appointed receiver herein to take charge of said property so held by said defendant, and that upon the delivery of said property to said receiver by the said defendant A. C., the said A. C. shall be discharged from further responsibility with respect thereto, either to the plaintiff or to the said D. S. It is further ordered that the said O. P. enter into a bond as such receiver, in the sum of \$——, and that when the property shall be turned over and delivered to him by the said A. C., he shall retain, manage and care for the same and hold it subject to the further orders of this court.

It is also further ordered that the said D. S. appear before this court on or before the —— day of ——, 18——, and make

known his claim to said property, or relinquish the same, and that a copy of this order be served upon him according to law.

R. S. Sec. 5016.

No. 1130.

Entry substituting Attachment or Execution Creditor in Lieu of Attaching or Execution Officer.

[*Caption.*]

Upon application of A. F., and it appearing that the defendant J. R., as sheriff, levied upon the property involved herein under and by virtue of a writ of attachment (*or*, execution) in a cause wherein the said A. F. was plaintiff and — was defendant, and that the said A. F. is the real party in interest, it is ordered that the said A. F. be and he is hereby substituted for the said sheriff J. R., and that the action proceed in the name of the said A. C. as such defendant.

R. S. Sec. 5018.

No. 1131.

Entry discharging Defendant upon Payment of Money or Delivery of Property.

[*Caption.*]

It appearing to the court that the defendant A. C. has complied with the order of this court heretofore made herein by paying to the clerk of this court the sum of \$—— (*or*, by delivering the property to O. P., the receiver appointed herein), it is ordered that the said A. C. be and he is hereby discharged from further responsibility with respect to said money (*or*, property) to either of said parties.

No. 1132.

Interpleader—Entry where Third Person fails to appear.

[*Caption.*]

This cause came on to be heard upon the previous order of the court requiring C. D. to appear and maintain or relinquish his claim against A. B., and it appearing to the court that the said A. B. was duly served with a copy of

said order, and has failed to appear, and the court being fully advised in the premises does order and adjudge that the said C. D. be and he is hereby barred of all claim as to the subject-matter of this action as against ——. And the costs of this proceeding in interpleader is to be taxed against ——.

JUDGMENTS—SUITS UPON.

No. 1133.

Judgment rendered in another County—Judgment and Decree of Court in.

[*Caption.*]

This day this cause came on to be heard upon the petition, the exhibits, evidence and testimony, and the defendant being in default for answer or demurrer to the petition, and the same being argued by counsel was submitted to the court, and the court being fully advised in the premises doth find all the allegations contained in the petition are true and that the plaintiff ought to recover from the defendant the sum of \$——, with interest thereon from this date at — percent, and their costs herein expended, taxed at \$——.

It is therefore here ordered, adjudged and decreed by the court that the plaintiff recover from the defendants said sum of \$——, with — percent thereon from this date, together with their costs herein expended.

No. 1134.

Decree when Judgment set up in Answer and Cross Petition.

[*Caption.*]

This day this cause came on to be heard upon the pleadings and evidence, was argued by counsel, and submitted to the court. And upon due consideration thereof the court finds that the allegations of said answer and cross petition are true, and that there is due the said defendant B. N., from the said defendant W. B., and upon the judgment set forth in said answer and cross petition, the sum of \$——, with interest from this date at the rate of — percent per annum until paid, and the court further finds that by virtue of the

judgment set forth in said petition and cross petition, and the levy of execution on said judgment upon the real estate of said W. B., as in said answer and cross petition set forth, the amount so found by the court to be due to the said defendant B. N., from said defendant W. B., upon said judgment is a valid and subsisting lien for the amount so found due upon the following described real estate of said W. B., to wit: Situate in the county of —, state of Ohio, and in the city of —. [*Description*].

It is therefore ordered, adjudged, and decreed by the court that an order of sale issue to the sheriff of — county, Ohio, commanding him to sell said above-described real estate as upon execution, and to report his proceedings under said order of sale, together with the proceeds of said sale, to this court for further orders, and the court upon good cause shown therefor further orders that publication of the notice of sale of said premises in a German newspaper be dispensed with.

LIENS.

See FORECLOSURE.

No. 1135.

Entry distributing Lienholders pro rata.

[*Caption.*]

This cause this day coming on to be heard on the answer and cross petition of the C. P. M. Co., the reply thereto, the answer and cross petition, and the reply thereto, and the exhibits and evidence, and being argued and submitted to the court, and the court being fully advised in the premises, do find that the respective liens of said The C. P. M. Co. and the W. M. P. N. and G. Co. are each valid and subsisting liens on the premises therein described, and that said defendants and each of them are entitled to pro rate with the other valid lienholders in the fund arising out of the sale of said premises.

And the court do further find that there is due the defendants The C. P. M. Co., from the defendant J. K. B., the sum of \$—, with interest from the date of the entry of this decree, and that there is due the defendant, the W. M.

P. M. and G. Co., from these defendants the sum of \$—, with interest from the date of the entry of this decree.

It is therefore considered by the court that the said The C. P. M. Co. and the W. M. P. and G. Co. each recover from the defendant J. K. B., said sums respectively, with interest from the date of the entry of this decree and judgment, their costs herein expended, for which execution is hereby awarded.

No. 1136.

Entry upon Petition to Marshal Liens for Sale of Real Estate on Account of former Judgment and Levy, also Setting Aside Conveyance to Defraud Creditors.

[*Caption.*]

This day this cause was duly and regularly assigned for trial, and came on for hearing on the petition and answer of guardian *ad litem* for the minor defendants, and the evidence, and was submitted to the court; on consideration whereof the court finds that on the — day of —, 18—, this plaintiff recovered a judgment against said defendants, H. S. and A. H. S., in the court of common pleas in — county, for the sum of \$—, with interest thereon at the rate of — percent per annum from said date, and cost of suit; that said judgment is a valid and subsisting judgment, and that no proceedings are pending for its reversal and retrial, and that there is now due thereon from said defendants, H. S. and A. H. S., to the plaintiff the sum of \$—, with interest from the first day of this term and cost of suit.

The court further finds that said judgment is and has been from the said — day of —, 18—, a lien on the real estate described in the first cause of action in the petition, to wit: [*Here give description. Not usually necessary or advisable.*]

The court further finds that the conveyance from the said H. S. to A. S. H., as trustee for the use of the defendants, H. L. S., E. R. S., and S. B. S., on the — day of —, 18—, of the premises described in the second cause of action of the petition, as follows: [*Give description*], was made with intent to hinder, delay, and defraud this creditor and other creditors of the said H. S., as the said plaintiff as in his petition averred.

It is therefore considered and adjudged by the court here that the said deed of conveyance from the said H. S. to the said A. S. H., as trustee, for the use of the said H. L. S., E. R. S., and S. B. S., be and the same is hereby set aside, vacated, and declared to be of no force or effect in law or

equity to affect or convey the title of said premises described in said second cause of action in the petition, to wit: [*Here describe premises.*]

It is further considered and adjudged by the court that the said real estate described in the second cause of action in the petition be subjected to the payment of the debts of the said H. S., according to the priorities hereafter to be determined.

MANDAMUS.

(*R. S. Secs. 6741—6759.*)

No. 1137.

Entry Setting Time for Hearing of Application and requiring Notice.

[*Caption.*]

This cause coming on to be heard upon the application of the relator herein for the allowance of a writ of mandamus, it is by the court ordered that the same be set for hearing on the — day of —, 18—, and that — days' notice of such application and of the time set for the hearing thereof be given to the defendant.

R. S. Sec. 6743. This is not usual. Kinkead's Code Pleading, Secs. 800, 806.

No. 1138.

Entry allowing Alternative Writ after Notice.

[*Caption.*]

This cause coming on to be heard upon the application of the relator herein for the allowance of an alternative writ of mandamus, notice thereof having been duly given, and no sufficient reason having been shown why such writ should not issue, it is ordered that an alternative writ of mandamus be allowed to issue against defendant, requiring said defendant to [*do whatever the act may be*], or to appear before this court on the — day of —, 18—, and show cause why he has not done so, at which date this writ is made returnable.

R. S. Secs. 6743, 6745, 6746. Kinkead's Code Pleading, Secs. 806, 807.

No. 1139.

Entry allowing Alternative Writ—Another Form.

[Caption.]

And now this cause coming on to be heard upon the motion for the allowance of a writ of mandamus, the petition, and the arguments of counsel. On consideration thereof the court, finding no sufficient cause has been shown against the same, do allow an alternative writ of mandamus to issue against the said J. F. O., auditor of the state of Ohio, returnable to this court according to rule, commanding him that immediately after the receipt of the writ he issue and deliver to the said H. H. his warrant upon the treasurer of the state of Ohio for the sum of \$—, as prayed for in said petition, or that he show cause why he has not done so.

Kinkead's Code Pleading, Secs. 806, 808.

No. 1140.

Mandamus Requiring Justice of the Peace to Sign a Bill of Exceptions.

[Caption.]

And now this cause coming on for hearing upon the application for the allowance of the writ of mandamus, on consideration whereof, the court finding that no cause has been shown against the same, it is ordered that —, respondent herein, do immediately sign the bill of exceptions, as prayed for by this relator, to bear date of —, 18—.

No. 1141.

Mandamus—Demurrer to Petition Sustained—Injunction Dissolved—Cause Dismissed.

[Caption.]

This day this cause came on to be heard upon the demurrers of the defendants, Board of Education of the Village of W., and T. J., to the petition, and the same being argued by counsel was submitted to the court. Upon consideration thereof, the court, being fully advised in the premises, finds that said demurrers are well taken and therefore sustains each thereof, to which ruling of the court the relator excepts.

And thereupon said cause came on further for hearing upon motion of the defendant, the Board of Education of the Village of W., to dissolve the temporary injunction heretofore granted, and the same being argued by counsel was submitted to the court, upon consideration whereof the court finds that said motion is well taken and does sustain the same, and does dissolve and vacate said injunction, the court here finding and adjudging that said injunction ought not to have been granted, and the relator not desiring to plead further, it is here ordered and adjudged by the court that this cause be and the same is hereby dismissed, and that the relator pay within — days from this date the costs of this action, taxed at \$——, and on failure so to do that execution be awarded as upon judgment at law.

No. 1142.

**Allowance of Alternative Writ to Compel School Board to
Award Contract and Temporary Injunction**

[*Caption.*]

And now comes the relator and makes application for the allowance of a writ of mandamus herein and injunction pending the hearing, as prayed for, and on consideration thereof the court allows an alternative writ to issue against said Board of Education of the township of —, — county, Ohio, returnable to the court on the — day of —, at — o'clock — M.; and it is ordered that the said Board of Education do, immediately upon the service of this writ, proceed to award the contract for the erection and completion of said school building, exclusive of heating and ventilation thereof, to the relator at the price named in his proposition therefor, or at the time and place of the return of this writ show cause why the same has not been done. And it is also further ordered that a temporary restraining order be and the same is allowed, as prayed for in the petition, against said Board of Education and said T. J., upon plaintiff's executing an undertaking in the sum of \$——, with surety to the acceptance of the clerk of this court, and conditioned according to law.

No. 1143.**Entry Allowing Peremptory Writ of Mandamus against Clerk of Courts.**

[*Caption.*]

And now this cause coming on for hearing upon the application for the allowance of the writ of mandamus, on consideration thereof the court finds that no cause has been shown against the same, and the court finds that the relator's right to require the performance of the act hereinafter commanded to be clear, and that no valid excuse can be given for not performing it, and therefore allows a peremptory writ to be issued, as prayed for; and it is ordered that the said C. F. G., clerk of the court of —— county, Ohio, do immediately upon service of this writ issue a writ of execution to the sheriff of —— county, Ohio, to levy on the goods and the chattels of the said defendant in the case of J. R. M. and J. B. M. v. V. S., court of common pleas, —— county, Ohio, and that for want thereof that he levy on the real estate of the defendants.

Kinhead's Code Pleading, Sec. 814.

No. 1144.**Entry Refusing Peremptory Writ.**

[*Caption.*]

This cause came on to be heard upon the alternative writ of mandamus heretofore issued herein, the answer of respondent, and upon the application of the plaintiff for a writ of peremptory mandamus, and was argued by counsel. On consideration whereof it is considered by this court that the relators are not entitled to the peremptory writ of mandamus prayed for. It is therefore ordered that the defendant go hence without day and recover of the relators his costs herein expended, to be taxed.

Kinhead's Code Pleading, Sec. 814.

No. 1145.

Mandamus—Entry Awarding Peremptory Writ Restoring to Membership in Corporation.

[*Caption.*]

This day this cause came on to be heard upon the petition of the relator and the issues joined between the parties, and the court having heard all the evidence adduced by the parties, and the arguments of counsel, and being fully advised in the premises, does award a peremptory writ of mandamus against the respondent, as prayed for in the petition herein, restoring the relator to his membership in the defendant corporation, with all the rights, privileges, and benefits of membership therein. And it is further adjudged that said relator recover from the said respondent his costs made in this behalf, to be taxed, to which rulings, orders, and judgments of the court defendant excepts. And thereupon the defendant, The — Company, files its motion to vacate and set aside said judgment, and for a new trial for reasons therein stated, which motion was submitted to the court, and the court being advised in the premises overrules the same, to which action and judgment of the court in overruling said motion the defendant at the time excepted and presented here its bill of exceptions in this cause, which being examined and found correct is allowed, signed, and sealed, and made a part of the record in this case.

MARRIAGE.

No. 1146.

Entry Annulling Marriage Contract with an Idiot and Setting aside and Annulling Deeds made during Coverture.

[*Caption.*]

This day this cause, having been regularly assigned for trial on the docket of this court, came on to be heard upon the petition and evidence and exhibits, the defendant being in default for answer, demurrer, or motion of any kind, and was argued by counsel and submitted to the court; and the court being fully advised in the premises, on consideration (the summons and return of service on the defendant by the

sheriff of — county, Ohio, being before the court) the court finds that the defendant has been duly served with summons herein, and further that she is duly represented by counsel herein, to wit, M. & C., attorneys at law, duly authorized in the premises by the defendant herein. And the court further finds on the evidence adduced that the allegations of the petition are true; that J. J. was, on the — day of —, 18—, duly appointed guardian of the person and estate of the said J. L. by the probate court of — county, and was on said — date by said probate court duly found, determined, and adjudged an idiot, and that letters of such guardianship were on such date issued to J. I. by said probate court, and that on said date, to wit, — day of —, 18—, J. I. duly qualified as such guardian, and entered upon the performance of his duties as such guardian, and that the said J. I. was at the commencement of this action, and still is, the duly appointed, qualified, and acting guardian of the person and estate of said J. L.; that said J. L., at the date of the pretended marriage with the defendant, E. L., in the first cause of action in the petition stated, was an idiot, wholly incapable of entering into a marriage contract; that he was an idiot from his birth, and has continuously been, and still is such idiot, and that said pretended marriage contract ought to be set aside, declared null and void, and held for naught.

It is therefore hereby considered, ordered, adjudged and decreed that said alleged marriage contract between said J. L. and E. L. be and the same is hereby cancelled, annulled, and set aside, and held for naught.

The court further finds that the deed of conveyance was fraudulent, and that the said E. L. took advantage of J. L.'s idiotic condition and caused him to make, execute, and deliver the said deed of conveyance described and set out in the second cause of action in the petition contained, and that the same was wholly without any consideration whatever, and ought to be annulled, cancelled, set aside, and held for naught.

It is therefore considered, ordered, adjudged and decreed that the said deed of conveyance, attempting to convey from the said J. L. to said E. L. the following described premises, situate in the county of —, state of Ohio, and township of —, and bounded and described as follows: [*Here give description*], be and the same is hereby annulled, cancelled, set aside, and held for naught; it is further decreed that by said deed of conveyance no title to the said premises ever passed from the said J. L. to the said E. L.; that the said alleged deed of conveyance was wholly inoperative to pass such title, and was null and void by reason of the fact that

J. L. was an idiot at the time of the execution and delivery of said deed, and incompetent mentally to make and execute the same, and because no consideration whatever passed therefor, and the title and possession of said premises are hereby decreed to be and remain in the said J. L., and he is hereby adjudged and decreed to be reinvested therewith the same as in his former estate, and the same as before the execution and delivery of said deed of conveyance, and the same as if the said deed of conveyance had never been made, executed, and delivered, and for the benefit of the said J. L.'s title to the said premises, and to remove all cloud therefrom it is hereby ordered, adjudged and decreed that the said defendant convey by quit-claim deed, duly executed according to law, the said premises to the said J. L. within — days from this date, to wit, the — day of —, 18—, and in default thereof that this judgment and decree have the operation and effect of such deed, and that the clerk have so much thereof as will show the transfer of title placed on record in the office of the recorder of — county, Ohio, and that the auditor of this county be directed and authorized to make the transfer on the tax duplicate and records of his office.

MISTAKE.

No. 1147.

Entry Correcting Mistake in Insurance Policy, and Finding thereon as Corrected.

[*Caption.*]

This day this cause came on to be heard upon the pleadings and the testimony, and the same was argued by counsel for both parties. And on the said issues joined on the first count of the petition the court finds in favor of the plaintiff, and that said parties to said policy of insurance by mutual mistake inserted therein the name of W. H. L., assignee of A. L., when it was their intention to have inserted the name of A. L., the plaintiff; and that the plaintiff is entitled to have said policy corrected to conform to the intention of said parties, as in the petition prayed. Therefore it is considered that the said policy of insurance be and the same is hereby amended and corrected by striking out the name of W. H. L., assignee of A. L., and by inserting in lieu thereof the name

A. L., conformably to the said intention of the parties. And thereupon, this action coming on further to be heard upon the issues joined in the second count of the petition, and the testimony, together with the argument of counsel of both parties, the court finds said issues in favor of the plaintiff, and assesses his damages in the premises at \$——.

Therefore it is considered that the plaintiff, A. L., recover of the defendant, the F. I. Co., the said sum of \$——, his damages aforesaid, together with the costs herein expended, taxed at \$——.

Now comes the defendant, the F. I. Co., and gives notice of its intention to appeal this cause to the circuit court of —— county, Ohio, and the court fixes the penalty of the appeal bond at double the amount of the judgment, to wit, (\$——) —— dollars and —— cents.

NUNC PRO TUNC ENTRIES.

NOTE.—The office of a *nunc pro tunc* entry is to record some act of the court done at a former term, which was not carried into the record, and can not be employed to do some act which a party failed to have the court do at the term at which a final judgment has been rendered. Its province is to correct the record in a cause so as to make it set forth an act of the court, which, though actually done at a former term, was not entered on the journal. It can not be employed to amend the record.

Cleveland Leader Print. Co. v. Green, 52 O. S. 487; Mitchell v. Thompson, 40 O. S. 110; Bothe v. Railway Co., 37 O. S. 147; Johnson v. Railway Co., 47 O. S. 318.

Several ways of preparing nunc pro tunc entries are given, and it would be well for the examiner to consult all before moulding his own from the one he follows as a guide.

No. 1149.

Nunc pro tunc Entry showing an Exception to overruling of Motion for New Trial.

[Caption.]

This cause coming on this day to be heard upon the motion of the defendant, the city of ——, for an entry *nunc pro tunc*, as of —— —, 18——, showing the exception of defendant to the overruling of the said defendant's motion for a new trial, and upon the evidence taken thereon, and it appearing to the court that the exception of the defendant, the city of ——, was taken at the time to the overruling of said motions

for a new trial, and that by inadvertence and oversight of the court and clerk the said exception so taken was, at the time, not noted on the journal, the court finds said motion of defendant well taken, and doth grant the same.

It is therefore now ordered by the court that the exception of the defendant, the city of —, be and the same is hereby noted to the overruling of said defendant's motion for a new trial, and it is further ordered by the court that this entry be now made as of — —, 18—, *nunc pro tunc*.

To all of which plaintiff by his counsel excepts.

Such an order is not reviewable upon error. *Cincinnati v. Steadman*, 53 O. S. 312.

No. 1150.

Nunc pro tunc Entry of Exceptions, and Filing and Allowance of Bill of Exceptions.

[*Caption.*]

The motion of H. T. for a new trial *nunc pro tunc* order coming on to be heard, and it appearing to court that upon the trial of this action at the — term thereof, A. D. 18—, the said defendant, H. T., excepted to the holding and judgment of the court and took his bill of exceptions therein, which was duly and legally allowed, signed, and sealed by said court, and duly and legally filed in this action during said term, and that the journal entry fails to show the same:

It is now by the court ordered that the following entry as of said — term, A. D. 18—, be made upon the journal of this court as part of the record in said case, to wit, [*copy the nunc pro tunc entry as it should have been*]:

To which ruling, decision, holding, and judgment of the court the said defendant H. T. excepted and took his bill of exceptions thereto, which said bill of exceptions were duly allowed, signed and sealed by the court, and were duly filed in said court, and ordered made part of the record therein.

No. 1151.

Entry nunc pro tunc Supplying omitted Entry.

[*Caption.*]

This cause came on to be heard upon the motion of plaintiff (*or*, defendant) for the allowance of an entry *nunc pro tunc* of an order and judgment duly made by this court on the —

day of —, 18—, at the — term thereof, in said cause as prayed in said motion.* And it appearing to the court that an order and judgment were duly made by this court on said date at said term, sustaining the demurrer to the petition herein and dismissing said petition, but that the same was through misadventence not entered at said time, the court grants said motion, and orders that the following entry be now entered by the clerk of this court upon the journal of this court as of the — day of —, 18—, and — term of said court, to wit: [*Copy of entry.*]

No. 1152.

Entry nunc pro tunc Amending and Correcting former Entry.

[*Caption.*]

[*Proceed from * in ante No. 1151.*]

And it appearing to the court that the entry made in said cause on the said — day of —, 18—, through inadvertence, did not express the order and judgment of the court as rendered by the court upon said date, the said motion is therefore sustained. It is therefore ordered that the said entry and judgment herein entered on said — day of —, 18—, be and the same is hereby corrected and amended so as to read as follows, to wit: [*Copy amended entry.*]

And it is further ordered that the said entry be made as of the said — day of —, 18—.

No. 1153.

Entry nunc pro tunc Amending Entry by showing Discharge of Jury.

[*Caption.*]

This cause coming on to be heard upon the motion of plaintiff for an order of court to be entered *nunc pro tunc* as of the January term, 18—, amending and correcting the entry made at said term on the — day of —, by reciting that the jury was discharged at that term for the reason that there was no probability of said jurors agreeing. And it appearing to the satisfaction of the court that such an order was made, but that the clerk of the court in making up the journal, by inadvertence, omitted to journalize the statement from the court docket that there was no probability of the jurors agreeing, it is ordered that the said entry be amended so as to

conform to the order as made at that time, and that the following entry be entered upon the journal of this court as of the — term, and of the date of —, 18—. [*Copy entry.*]

Benedict v. State, 44 O. S. 679.

No. 1154.

Entry and Allowance of nunc pro tunc Order of Allowance of Bill of Exceptions.

[*Caption.*]

This day, — —, this cause came on for hearing upon the motion of the defendant, the C. C. and M. Co., for *nunc pro tunc* order showing the allowance, signing, sealing, and placing on file, and making part of the record in this case the bill of exceptions, which was taken at the trial of this cause within the time allowed by law, and the orders of this court therefor, and said motion was heard upon the evidence; and from the evidence introduced by said defendant in support of its said motion the court find that upon the overruling of the motion for a new trial in this case the defendant asked and obtained — days' time within which to prepare its bill of exceptions taken at the trial of this case, and present the same to the court, and have the same signed, sealed, allowed, and ordered placed on file, and made a part of the record in this case, and that for said purpose the record of this court for said — term, A. D. 18—, of said court, at which this case was tried, was ordered to be kept open, and the court further find that the said bill of exceptions was actually prepared and presented to the court, to the trial judge who sat at the trial of said case, within the — days so allowed by the court and the law for that purpose, and was actually signed by said trial judge of said court within said — days from the overruling of the motion for a new trial, to wit, on the — day of —, A. D. 18—, and was then allowed, signed, sealed, and ordered placed on file, and made part of the record in this case, as the true bill of exceptions taken at said trial thereof; the court further find that on the next day, to wit, on the — day of —, A. D. 18—, within the said — days allowed for that purpose, the said bill of exceptions was actually placed on file in the office of the clerk of this court, and on said — day of —, A. D. 18—, a journal entry was prepared by the attorney of said defendant and placed in the office of the clerk of this court, with the other file papers in this case to be filed and entered on the journal of the court,

of which journal entry the following is a true copy, to wit:
[Copy journal entry as at No. 934 and proceed.]

The court further find that said journal entry was not actually entered upon the journal within — days from the overruling of the motion of said defendant for a trial. It is therefore ordered and adjudged by the court that the said journal entry be now entered upon the journal of this court in said case as of said — day of —, 18—, at which time it was furnished to the clerk and should have been entered on the journal.

OCCUPYING CLAIMANT.

(R. S. Secs. 5786—5796.)

No. 1155.

Entry Impaneling Jury to try Question of Value and Damages.

[Caption.]

This day this cause came on for hearing upon the demand of M. P. (defendant) for an assessment of the value of improvements heretofore made herein under the statute for the relief of occupying claimants. And thereupon came the following named jurors, who were duly impaneled and sworn according to law; and thereupon this cause came on for hearing, and said jury is ordered to view the premises in controversy herein, and that the same be shown to them by J. C., and that they return forthwith after making said view.

R. S. Sec. 5789.

No. 1156.

Entry of further Hearing and Verdict.

[Caption.]

This day again came the parties, and also came the jury heretofore impaneled and sworn, and having viewed the premises, said cause proceeded, and the jury having heard the evidence adduced, and the argument of counsel, and charge of the court, retired into their room for deliberation.

And now comes the jury into open court with their verdict, signed by their foreman, which is as follows: [*Copy verdict.*]

And thereupon came the plaintiff (*or*, defendant) and made a motion to set said verdict aside, and the further hearing of said cause is continued.*

No. 1157.

Entry upon Motion to set aside Verdict—Judgment for successful Claimant—Electing to receive Value of Land.

[*Caption.*]

This cause coming on further to be heard upon the motion to set aside the verdict herein, and the court being fully advised in the premises, overrules said motion.

And the said — (successful claimant) having elected to take the value of the land as assessed by the jury without the improvements at the sum of \$—, and to execute a deed to the said — for said premises, it is therefore ordered that the said — be allowed — days within which to make payment, and the said — is allowed the same time to deliver his deed to the said —, and that if the said — fails to pay said sum within said time, that a writ of possession be allowed to issue in favor of the said —.

R. S. Sec. 5795.

No. 1158.

Entry of Judgment for successful Claimant.

[*Caption.*]

[*Proceed from * in ante No. 1156.*]

It is therefore ordered that the said plaintiff recover from the said defendant the difference between the damages sustained by said plaintiff by reason of the waste committed by said defendant, as found by the jury, of the sum of \$—, and the value of the improvements so awarded by the jury, \$—, amounting to the sum of \$—, together with his costs herein, for which execution is awarded.

R. S. Sec. 5792.

No. 1159.

Entry setting aside Valuation by Jury, and Ordering another Valuation.

[Caption.]

This cause coming on further to be heard upon the motion to set aside the verdict of the jury, and the court having heard the argument of counsel, and being fully advised, finds that said motion is well taken, and does therefore sustain the same, and the said verdict and assessment is hereby set aside and held for naught. It is also further ordered that another jury be impaneled, and that a new valuation of said improvements be made.

R. S. Sec. 5791.

PARTITION.

No. 1160.

Entry Authorizing Service by Publication.

[Caption.]

Upon motion and affidavit of plaintiff herein, and it appearing to the court that the residence of [*names of heirs*] are unknown to the plaintiff (*or*, that the names and residence of the heirs of T. E., deceased, are unknown to plaintiff), it is therefore ordered that service may be made upon the said non-resident defendants (*or*, that proceedings may be had against said unknown heirs, that they may be served) by publication according to law, and that said unknown heirs may be designated as the unknown heirs of T. E., deceased.

R. S. Sec. 5053 authorizes proceedings against unknown heirs without naming them. An affidavit must be also filed as in Sec. 5049.

No. 1161.

Ordering Creditors having Liens to be made Parties.

[Caption.]

It appearing to the court that there are creditors having liens on the premises herein who are not parties hereto [*name them*], it is therefore upon motion ordered that said persons be made parties hereto.

No. 1162.

Order of Partition where Dower is to be Assigned.

[*Caption.*]

This day this cause came on to be heard on the petition and answers of J. T., etc., and the court upon due consideration finds that all of the defendants have had due and legal notice of the filing, pendency, and demand of the said petition herein, and that, excepting J. T. and M. T., they are all in default for answer or demurrer to said petition, and that more than a year has elapsed since the death of —, deceased; (*or*, that the debts of the said —, deceased, have been paid, or secured to be paid; *or*, that the personal estate is sufficient to pay the debts of said estate.) The court further finds that the said plaintiff and the said defendants herein-after named are tenants in common in the estate described in the petition; that the widow of A. W., deceased, is entitled to dower in the undivided — part thereof, and that the said plaintiff has a legal right to the — part thereof of said real estate; and that subject to the dower right of the said widow of the said A. W., the said C. P. has a legal right to the — part of said estate, and that subject to the said dower estate the heirs of the said A. W., deceased, have a legal right to the — part of said estate; that the said N. T., J. T., A. T., etc., have each a legal right to the — part of said estate, and that the said P. T., W. T., M. M., etc., have each a legal right to the — part of said estate, and that more than a year has elapsed since the death of —, deceased (*or*, that the debts have been secured to be paid), and that the plaintiff is entitled to have partition made of the premises, as prayed for in his petition.*

It is therefore ordered, adjudged, and decreed that partition of said premises described in the petition be made, and that the dower of the said widow of A. W., deceased, be assigned in the said several shares or interest of the said A. W., deceased, and that J. H., J. K., and B. L., three judicious and disinterested freeholders of the vicinity, are hereby appointed as commissioners to make and set off the same. And it is further ordered that if said estate is entire and can not be divided by metes and bounds, that the dower of the said widow of the said A. W., deceased, be assigned as a — part of the rents, issues, and profits of the said shares or interest belonging to the said A. W., deceased, and that the said estate be appraised subject to such dower interest, and

the said shares or interests of the heirs of said A. W., and that the sheriff make return of his proceedings under this order with all convenient speed.

R. S. Secs. 5756, 5757.

No. 1163.

Another Form of Decree where there is no Widow, and there have been Intermarriages.

[*Caption.*]

This day this cause came on to be heard upon the petition of plaintiff, pleadings, and evidence, and the record in the case, and was argued by counsel, and the court being fully advised in the premises do find that all of the defendants have had due and legal notice of the pendency and demands of said petition, and that they are in default for answer thereto, and that the allegations in said petition contained are thereby confessed by them to be true.

The court further find that the widow of the said A. H., deceased, does not survive him, and that the defendants A. H., J. H., W. H., P. H. H., M. M., A. B. H., C. S. nee H., who intermarried with the said P. S., defendant, C. W. nee H., who intermarried with the said F. W., defendant, and A. A. W. nee K., who intermarried with the said J. I. W., defendants, are tenants in common in the estate described in the petition, to wit: [*Description.*]

The court further finds that the plaintiff W. H. K. has the legal right in the one — part thereof; that the defendants A. H., J. H., P. H. H., C. S. nee H., who intermarried with the defendant P. S., have each a legal right to the — part thereof; that the defendant C. W., who intermarried with the defendant F. W., C. W. has a legal right to the — part thereof; that the said W. H., defendant, has a legal right to the — part thereof; that the said M. H. and A. B. H., defendants, have each a legal right to the — part thereof, and that the said A. W. nee K., who intermarried with the said J. I. W., defendant, has a legal right to the — part thereof. The court do further find that the plaintiff is entitled to have partition of said estate made, as prayed for in his petition.

It is therefore ordered, adjudged, and decreed that partition of said estate be made in favor of all parties in interest, and that W. F. B., C. L. S., G. H., three judicious and disinterested freeholders of the vicinity, are hereby appointed commissioners to make the same, if the same can be done without

manifest injury to the value of said premises, and if not, that said premises be appraised by said commissioners at the true value thereof in money, and it is further ordered that a writ and order of partition issue to the sheriff of — county, commanding him to cause said partition to be made accordingly, and of his proceedings to make due return.

No. 1164.

Order of Partition where there is no Widow—Where Personal Property is sufficient to Pay all the Debts.

[*Caption.*]

This day this cause came on to be heard upon the petition and the evidence, and the court being fully advised in the premises finds that all of the defendants have had due and legal notice of the pendency and demand of the said petition, and are in default for answer thereto, and that the personal property is sufficient to pay all the debts owing by the estate of G. M., deceased, and that since the bringing of this suit the defendant J. N. has conveyed and transferred his undivided one-fourth interest in said premises to the defendant J. M., as set forth in said petition. Thereupon the court further finds that the plaintiff and the defendants M. M., J. N., and F. W., hereinafter named, are tenants in common in the estate described in the petition, and that each of the above-named tenants in common have a legal right to equal portions of said estate, as set out in the said petition, as follows:

1. W. M., the plaintiff, the one — interest in said estate in fee.
2. F. M., the one — part of said estate in fee.
3. To J. B. M., grantee of J. M., the — part thereof in fee.
4. To M. M., the one — part thereof in fee.

And that the plaintiff is entitled to have partition of said estate made as prayed for in his petition. (*a*)

It is therefore ordered, adjudged and decreed that partition of said estate be made in favor of all parties interested; and that J. M., of —, J. H., of —, and H. H., of —, three judicious and disinterested freeholders of the vicinity, are hereby appointed to make said partition. And it is now ordered that a writ of partition issue to the sheriff of — county, Ohio, commanding him that by the oaths of the commissioners above named, he cause to be set off and di-

vided to each of the above-named parties the part and proportion of said estate to which they are severally above found entitled, and of all his proceedings herein said sheriff is ordered to make due return.

R. S. Secs. 5756, 5757.

No. 1165.

Entry ordering Partition—Determining Ownership of Interests.

[*Caption.*]

This day came the parties, and this cause coming on to be heard, the same was submitted to the court upon the pleadings and evidence, and the court having heard the evidence and the arguments of counsel, and being fully advised in the premises, finds the issues joined between said plaintiff and said P. W. in favor of said plaintiff, that said plaintiff is seized of the legal title to the undivided two fifths of the lands and tenements in the petition described in fee simple, is entitled to the immediate possession thereof, and to have the same partitioned and set off to her as in the petition prayed.

It is therefore considered and adjudged that said plaintiff recover of said defendant, P. W., the said undivided two equal fifth parts of said lands and tenements, and that partition of the same be made so that said two equal fifth parts thereof be set off to said plaintiff in severalty, and to that end it is ordered further that a writ or order of partition issue herein, directed to the sheriff of this county, and commanding him by the oaths of A. S., T. O. D., and J. D., three disinterested freeholders of this county, who are hereby appointed commissioners for that purpose, he cause partition to be made of said lands and tenements in the petition described, so that two equal fifth parts thereof be set off to said plaintiff in severalty, and it is further considered and adjudged that said plaintiff recover of said defendant, P. W., the costs of said plaintiff in this behalf expended, taxed at \$——.

No. 1166.

Entry when amicable Partition is made.

[*Caption.*]

This day this cause came on for hearing upon the petition, and thereupon came each and all of the defendants, E. R.,

T. R., W. R., and J. E., against whom partition is demanded, in person and by their attorney, and consented to the partition of the premises in the petition described, agreeably to the prayer and facts set forth in the petition, producing their said written consent to partition, and it appearing from the allegations in the petition and from the proof adduced that all of the debts and claims against said C. R., deceased, have been paid, or been secured to be paid (*or*, that the personal property is sufficient to pay the debts of said estate; *or*, that a year has elapsed since the death of said decedent), and that all of the parties hereto have agreed to and signed said written consent, the court thereupon finds that the plaintiff, —, and the defendants [*naming them*] are each the owners of the — undivided — part of said premises, and are entitled to have partition made thereof agreeably to the petition and the consent of parties entered herein. It is therefore ordered by the court the said parties each hold the several parts of said premises as partitioned by them in severalty, and that said written amicable partition and plat thereof be recorded according to law, when it shall be valid and binding between the parties thereto. It is further ordered that the sheriff execute and deliver a good and sufficient deed to the said several parties for the portion so set off and assigned to such parties.

[*Or*, It is therefore ordered that (*where commissioners are appointed, proceed as in entry No. 1164 from (a)*; *where the parties have made partition among themselves, proceed with order accordingly, as in post No. 1170 from **).]

R. S. Sec. 5761.

No. 1167.

Entry where Dower is waived by Widow.

[*Caption.*]

[*Proceeding from * in ante No. 1162.*]

And it appearing from the answer of —, widow, that she has waived the assignment of her dower in said premises by metes and bounds, and asked to have the same allowed to her in money out of the proceeds of the sale of said premises, if it be found by the commissioners that said premises can not be divided, it is ordered that [*names of commissioners*], three judicious and disinterested freeholders of the vicinity, who are hereby appointed for that purpose, do upon their oaths set off and divide to the said parties hereinbefore named the several parts and portions of said premises to which they

are entitled, as herein found and determined; and to also set off and assign to —, widow, her dower therein, if the same can be divided; and that if, in the opinion of said commissioners, the said premises can not be divided according to the order of this court and the writ issued to them without manifest injury to the value thereof, that they return that fact to the court, together with a just valuation and appraisement of said premises.

R. S. Secs. 5719, 5770.

No. 1168.

Appointment of Receiver in Partition.

[*Caption.*]

And now come the said parties, by their attorneys, and thereupon this cause came on to be heard upon the motion of the plaintiffs for the appointment of a receiver herein, and was submitted to the court upon affidavit of the plaintiff and the papers in the case, and was argued by counsel, and the court, being fully advised in the premises, do sustain said motion, and it is hereby ordered that B. D., Esq., be and he is hereby appointed receiver herein of all the property described in this action, to take charge of the same, rent, and maintain ordinary repairs, collect rents now due and owing, sell grain, etc., pay taxes, and protect said property from trespass and damage, and perform such other duties in the premises as may be required of him from time to time by the court. And it is further ordered that the said D., before entering upon his duties as such receiver, that he execute to the state of Ohio an undertaking in the sum of \$——, with good and sufficient security to the satisfaction of the clerk, conditioned according to law. And it is further ordered that the defendant, M. E. D., who is now in the occupancy of the dwelling house on said premises, be not disturbed or molested in such occupancy until the further order of the court.

No. 1169.

Report of Commissioners confirmed where Dower assigned by Metes and Bounds, and Land divided.

[*Caption.*]

This day this cause came on for hearing upon the motion of the plaintiff to confirm the report of the commissioners

heretofore filed. And the court, being fully advised and having examined said report and proceedings of said commissioners, and having found them to be in all respects in accordance with law, hereby approves and confirms the same.

It is therefore considered and adjudged that said plaintiff, B. C., be endowed as therein provided and hold said real estate set off for her dower interest and real estate described in said petition, and that the said parties each hold in severalty the parts and portions of said premises so set off and assigned to each of them respectively.

No. 1170.

Entry Overruling Exceptions to Report of Commissioners—Confirmation of Same when Lands Divided—Declaring a Right of Way in Premises Perpetual.

[*Caption.*]

This day this cause came on to be heard on the exceptions of V. H. to the commissioner's report filed herein, and the motion of the said V. H. to set aside the report of the aforesaid commissioners, and that an alias order of partition issue therein, and upon the affidavits and exhibits produced for and against said exceptions, and said motion was argued by counsel and submitted to the court. Whereupon the court being fully advised in the premises, and having examined fully the evidence and being satisfied that in all respects said proceedings were had regularly, and that said exceptions were not well taken, and that said motion should not be sustained, and doth overrule said exception and said motion.

And coming on further to the hearing of the motion of plaintiff J. H. to confirm the return of the sheriff and the report of the commissioners heretofore appointed herein, and the same having been examined by the court and found in all respects correct and in conformity to law and the former orders of this court, the said proceedings and report are hereby approved and confirmed.

* It is therefore ordered and decreed that the said parties hold in severalty the parts and premises so set off and assigned to each respectively. It is further adjudged and decreed that the roadway extending from the county road, extending west along the south side of lot number 10 of a former partition, etc., being fifteen feet in width off the south side of lot number ten and extending along the south side of said lots eleven and twelve of this partition, be and

remain perpetually a right of way to lots eleven and twelve, and it is further ordered that the costs of this action, taxed at \$——, including counsel fee of \$—— to ——, attorney, for services herein, be taxed as part of the costs in this case, to be paid by the parties in proportion to their respective shares of interest herein.

No. 1171.

Report of Commissioners Confirmed—Order of Sale free of Dower
—No one Electing to Take.

[*Caption.*]

This day this cause came on for hearing on the return of the sheriff and the report of the commissioners heretofore appointed herein, and upon the plaintiff's motion to confirm same. Upon consideration whereof, and the court being fully advised in the premises, and upon careful examination of said report, and it appearing from said report and return, and the court also being satisfied that said estate can not be divided without manifest injury thereto, and that said commissioners have made and returned their appraisement and estimate of the value of said premises in the petition, described as follows: [*Description*], at the sum of \$——, free from the dower of A. B., widow; and the court finding said return and report and said proceedings to be in all respects correct and in conformity to law and the former order of this court, it is therefore now by the court here ordered, adjudged and decreed that said return, said report and said proceedings be and the same are hereby in all respects approved and confirmed. And each and all of the parties herein having failed and neglected to take said premises at their appraised value, it is now, therefore, upon motion of the plaintiff, ordered, adjudged and decreed that said premises be sold at public auction, at not less than two thirds of the appraised value, at the door of the courthouse of said —— county, Ohio, by the sheriff of said —— county, according to law, free from dower, upon the following terms, to wit: [*state terms*], and that said sheriff is ordered to return his proceedings hereunder without unnecessary delay.

No. 1172.**Entry of Confirmation of Commissioners' Report—Ordering Sale
where no one Elects to Take Premises.**

[*Caption.*]

On motion of the court by —, attorneys for plaintiff, and upon producing the proceedings of the sheriff and also the report of the proceedings of the commissioners hereinbefore appointed, and the same being examined by the court, it is ordered by the court that said proceedings and report be and the same are hereby approved and confirmed. And thereupon none of the parties electing to take said estate at the valuation thereof as returned by said commissioners, on motion of the petitioner it is ordered by the court that said estate be sold at public auction by the sheriff of said county of —, according to the statutes made and provided, upon the following terms, to wit:

One third cash on the day of sale, one third in one year, and one third in two years thereafter, with interest from date of sale; such deferred payments to be evidenced by promissory notes of the purchaser, payable to the parties respectively entitled and secured by mortgage upon the premises.

No. 1173.**Confirmation of Sale when made to Third Person—Deed ordered
—Order of Distribution—Where there are Street Assessments
[Dower in Money].**

[*Caption.*]

On motion to the court by —, attorneys for plaintiff, and upon producing the proceedings of the sheriff with respect to the sale of the premises in the petition described by him made in pursuance of the former order of this court, and the same being examined by the court, the court here finds that the said proceedings and sale have been had and made in pursuance to law, and the same are hereby approved and affirmed, and the said sheriff is ordered and directed to execute and deliver to the said purchaser at said sale, W. B. B., a deed in fee simple for said premises, upon compliance by said W. B. B. with the terms and conditions of said sale, and the court coming now to make a distribution of the proceeds of said sale, amounting to the sum of \$—— (the court finds that the improvements of the street under the provisions of

the law so called that the assessments therefor constitute liens on said premises and that the same are entitled to payment out of said proceeds, and that the same amount to \$——. The court finding further that the said purchaser is willing to assume said assessments and pay the same as they fall due in installments, it is ordered and adjudged by the court that the said liens for assessments as aforesaid be assumed by said purchaser and that he receive a credit upon his cash payment therefore, the same to be repaid to him out of the money by him paid into the hands of the sheriff in this case).

[Where there is dower, and the widow —— having waived the assignment of dower to her by metes and bounds and elected to take the same in money, the court finds the just and reasonable value thereof to be \$——.]

And the court coming now to distribute the balance of said cash payment, to wit, \$——, it is ordered that the said sheriff pay out of the said proceedings, first, to the treasurer of the —— county, Ohio, the taxes due on the said property for the last half year of the ——, 18——, to wit, \$——; second, the costs of this action, amounting to \$——, including therein an attorney fee to the attorneys of plaintiff, amounting to \$——, also attorney fee to the attorney for defendant, amounting to \$——; third, that said sheriff distribute the residue of the said purchase price of said premises and take promissory notes from said purchaser for deferred payment and distribute the same and likewise the residue of said cash payment between the said heirs of the said A. H., deceased, in the following proportions, to wit: To ——, the widow, the sum of \$——; to P. H., —— part; to A. H., —— part; to J. H., —— part; to W. H., —— part; to C. S., —— part; to C. W., —— part; to M. A. H., —— part; to A. B. H., —— part; to W. H. K., —— part; to A. W., —— part; the said deferred payments are to be secured by mortgage on said land and tenements, which, being produced to the court, are hereby approved.

R. S. Secs. 5765-67.

No. 1174.

Entry confirming Sale to one of the Parties electing to take Premises.

[Caption.]

This cause coming on to be heard upon the motion to confirm the return of the commissioners heretofore appointed

herein to make partition of the premises as prayed for in plaintiff's petition, and it appearing to the court upon examination thereof that said premises could not be divided without manifest injury to the parties, and that said commissioners therefore returned an appraisement of said premises (free from the dower of T. E., widow), and the court having found said return and report in all respects regular and in conformity to law, the same is hereby approved and confirmed.

And thereupon came R. E., [*or others*] one of the parties hereto, and made known to the court his election to take the said premises at its appraised value. It is therefore ordered and adjudged by the court that said estate be adjudged to said R. E., and that the said sheriff make, execute and deliver a good and sufficient deed for said premises to the said R. E., upon payment by the said R. E. to said sheriff of the purchase price thereof at not less than the appraised value thereof, \$——, cash in hand, and upon the execution of a mortgage upon said premises to secure the remainder thereof, one third in one year, and one third in two years, said deferred payments to bear interest, and that said sheriff hold the funds arising from said sale subject to the further orders of this court.

R. S. Secs. 5762, 5763. Judge Yaple (Prac. and Prec. p. 842) says that the statute (5763) means that if they elect to take it *together* as tenants in common; that if *each* elects to take the *whole* premises for himself to the exclusion of the other, then the premises must be sold.

PERPETUATION OF TESTIMONY.

(R. S. Secs. 5873—5879.)

No. 1175.

Filing of Petition for Perpetuation of Testimony.

[*Caption.*]

Now comes A. B. and files herein his petition for an order allowing him to make an examination of witnesses for the perpetuation of his testimony. And the court having carefully examined the said petition and being fully advised in the premises, finds that said petition is properly verified; that it states the subject-matter relative to which the testimony is to be taken, the names of the persons interested, the

names of the witnesses and the interrogatories to be propounded; and the court being satisfied that the applicant expects to be a party to an action in a court, in this state, and that the testimony will be material thereto, and that the said petitioner can not now commence said action, it is ordered by the court that the said A. B. be allowed to make an examination of the witnesses therein named, upon the written interrogatories in his petition set forth, and that said examination be conducted at the office of —, on the — day of —, before C. D., who is hereby authorized to take such examination and report the same to this court. It is also further ordered that the parties interested in said matter mentioned in said petition be given — days notice of the time and place such examination is to be made.

R. S. Sec. 5873 *et seq.*

No. 1176.

Notice to be Given of such Examination.

[*Caption.*]

You are hereby notified that in the courtroom of the courthouse, in the city of —, on the — day of —, 18—, at — M., the undersigned will proceed before N. P., a notary public, pursuant to an order of the — court made on the — day of —, 18—, to take the deposition of R. L. of and concerning the following facts [*state them*], to be used and read in evidence in any trial or controversy hereafter arising concerning said matter; and the taking of said deposition will be adjourned and continued from day to day until completed.

Dated —, 18—.

A. B.,

Per L. T.,

Attorney for said A. B.

I hereby acknowledge service of the above notice at the city of —, Indiana, on this — day of —, 18—.

C D.

No. 1177.

Entry of Approval of Examination.

[*Caption.*]

This day came A. B. and presented to the court the report of the examination made herein by C. D., heretofore ap-

pointed to conduct such examination; and the court having carefully examined said report, and finding that such examination has been conducted in conformity to law and the order of this court, does approve the same, and order that said deposition and examination be filed in this court for the uses and purposes according to law.

It is ordered that the petitioner herein pay the costs herein to be taxed.

R. S. Sec. 5878.

PROMISSORY NOTES.

No. 1178.

Judgment on Joint and Several Note.

[*Caption.*]

This day this cause came on to be heard upon the petition of plaintiff, the answer of defendants and the reply of plaintiff thereto, and the evidence, and was argued by counsel and submitted to the court, and the court upon careful consideration whereof doth find on the issues joined in favor of the plaintiff in this action; that the said defendants, W. A. C., F. E. H. and J. O. K., and each of them, are jointly and individually liable on said note as in the petition alleged; that there is due plaintiff from said defendants and each of them the sum of \$——, including interest to the — day of ——, 18—.

It is therefore ordered, adjudged and decreed that the plaintiff herein, E. G. W., recover from the defendants, W. A. C., F. E. H., and J. O. K., jointly and individually, the said sum of \$——, with interest at the rate of — percent per annum from the — day of ——, 18—, and his costs herein expended, taxed at \$——.

No. 1179.

Entry of finding that Note not purchased in usual course of Business, etc.—Motion for New Trial Overruled—Judgment upon Note—Injunction by Circuit Court Dissolved.

[*Caption.*]

This day this cause came on for hearing upon the pleadings and the evidence and the record in said cause, and was

argued by counsel, and the court being fully advised in the premises on the issue joined in said cause between the said plaintiff and the defendant and cross petitioner, C. C., do find the same in favor of said defendant and cross petitioner, and against the said plaintiff. The court do also find that the said plaintiff, S. M., did not purchase the promissory note in his said petition described, in the usual course of business and for a good and valuable consideration, as in his said petition alleged, and is not the owner thereof, and that the allegations regarding the same in his petition contained are untrue. The court further find that the allegations set forth in the joint answer and cross petition of the said defendants, J. H. and H. B., and the answer and cross petition of C. C. are true, and that by reason thereof the legal rights and equities of the case are with her, and she is entitled to the ownership of said note, and the proceeds arising therefrom, as in her said answer and cross petition prayed for.

And thereupon the plaintiff filed his motion for a new trial herein for the reasons in said motion stated, which was argued by counsel, and the court being fully advised in the premises do overrule said motion, to which judgment of the court in overruling said motion the plaintiff at the time excepted. It is therefore ordered, adjudged and decreed by said court that the defendant, H. B., pay the money due and payable on said promissory note, to wit, the sum of — dollars (\$—), with interest from the — day of —, A. D. 18—, the date of the death of said P. S., Sr., to the — day of —, A. D. 18—, the date of the filing of his answer and cross petition herein, to J. E. M., clerk of courts of said county, for the benefit of the said C. C., and in satisfaction of the judgment in her answer and cross petition described, and that the said C. C. recover of the said plaintiff, S. M., her costs herein, taxed at \$—, and that said plaintiff pay his own costs, taxed at \$—, and that the injunction heretofore allowed in this cause by the court of common pleas be hereby annulled, set aside and held for naught, to all of which judgment and decree the plaintiff, by his attorneys, at the time excepted, and on motion by him, fifty days from the — day of —, 18—, is allowed said plaintiff in which to prepare and have signed and sealed a bill of exceptions in said cause. Thereupon on the — day of —, 18—, the same being within the time allowed by the court, the said plaintiff presented his said bill of exceptions duly allowed, signed and sealed by the court, and filed the same herein.

QUIET TITLE—ACTION TO.

No. 1180.

**Entry Quieting Title (Approving Service by Publication)—
Usual Entry.**

[*Caption.*]

This day came the plaintiff by his attorney and offered proof of publication of the pendency of this action, and of the prayer of the petition herein; and the court finding said petition and proof thereof in all respects regular and according to law and the former order of this court, the same is hereby approved and confirmed.

Thereupon this cause came on further to be heard, and was heard upon the pleadings, exhibits and the testimony, and was argued by counsel and submitted to the court. And upon due consideration thereof and the court being fully advised in the premises finds that due and legal service has been made upon the defendants, the unknown heirs of —, according to law, and that the court has thereby acquired jurisdiction of the said defendants and of the subject-matter of this action; and the court further finds that each and all of the averments and allegations of facts contained in the petition are true, and that the plaintiff is entitled to the relief in said petition prayed for.

The court finds that at the time this action was commenced the said plaintiff was in possession of the said real estate described in the petition, and that he has a legal estate therein and is entitled to the possession of the same; that the said defendants, and neither of them, have any estate therein, and neither of them is entitled to the possession of said real estate or any part thereof, and that the plaintiff ought to have his title quieted as against each and every person claiming by, through, or under them, or either of them, as prayed for in his said petition.

It is therefore ordered, adjudged and decreed that the title and possession of the said J. D. to all and singular the premises in the petition described, be and the same are hereby quieted as prayed for in the petition as against the defendants, each and all of them, and all persons claiming by,

through or under them, or either of them; and the said defendants, and each and all of them, are hereby forever enjoined from setting up any claim to said premises, or any part thereof, adverse to the title and possession of said J. D., or from in any manner interfering with his use and enjoyment of the same.

It is further ordered that the plaintiff pay the costs of this action, taxed at \$——.

R. S. Sec. 5779; Kinkead's Code Pleading, Sec. 1039; Whittaker's Civil Code, p. 445 note.

No. 1181.

Entry of decree cancelling Conveyance to Wife by Husband—Declaring Title in him—Quieting his Title against Heirs—Awarding Deed to Plaintiff from the Defendants, and in default thereof, decree to pass Title; also in default of Deed from Defendants, Sheriff made Special Master to convey Deed.

[*Caption.*]

This day comes the plaintiff, W. H. I., by ——, his attorneys, and also D. B. S., as guardian *ad litem*, duly appointed by the court for the minor defendants C. G. I., R. F. I. and E. M. I., and also came the defendant J. G. W., and thereupon this cause came on to be heard upon the issues joined between the plaintiffs and the said guardian *ad litem*, D. B. S., and was submitted to the court on the petition and answer of D. B. S., as guardian *ad litem*, as aforesaid, and the evidence, and was submitted by counsel. Upon due consideration whereof, the court being fully advised in the premises finds that the defendant C. G. I. is a minor over 14 years of age, R. F. I. and E. M. I. are minors under 14 years of age, and the court further finds that all the defendants in this case have either been duly served with summons or have waived the issuance of summons and voluntarily entered their appearance to this action, and that all the defendants are now before the court, and that the real estate described in the petition is situated in the county of ——, state of ——, in the city of ——, and is therefore within and subject to the jurisdiction of the court. And the court further finds upon the issues in favor of the plaintiff, and that the facts stated in his petition are true as therein alleged, and that the plaintiff is entitled to the relief therein prayed for. That the plaintiff on the — day of ——, 18—, purchased of J. M. A. and A. M. A. the real estate described in the petition, to wit: [*here follow*

with description of premises], and that said plaintiff paid for said premises hereinbefore described with his own separate means and money, and that the legal title to said premises was conveyed to the wife of the said plaintiff then living, A. M. I., for the purpose as in the said petition set forth. The court further finds that the said A. M. I., at the time of her death, on the — day of —, 18—, held the naked legal title to the premises only in trust for her husband; that the said A. M. I. paid, or caused to be paid, no part whatever of the consideration for said property; that the said plaintiff has put lasting and valuable improvements on the premises at his own expense; that since the conveyance to the said A. M. I. the said plaintiff has been seized, possessed of, and is now the complete and full owner in his own right of the equitable title to said premises, and the court doth further find that at the time of the death of said A. M. I. that she held the legal title to said premises as a trustee in trust and for the use and benefit of the plaintiff, and that the subject of said trust has failed, and the death of said A. M. I. has made it impossible to fully fill the same; that the plaintiff is the full owner in equity of said premises and entitled to the whole beneficiary interest thereto, and that the plaintiff is entitled to have the legal title of said premises conveyed to him and to have his title quieted against any and all claim of said defendants except the claim secured by mortgage to said J. G. W., whose rights are hereby as against the plaintiff and the other defendants protected.

It is therefore considered, ordered, adjudged and decreed that each and all of said defendants, except the said defendant J. G. W., within — days from the date of this decree release and convey to this plaintiff all the claim, title and interest they or either of them have in or to said premises, and in default thereof, then that this decree stand and operate and have the force and effect of such conveyance.

It is further ordered, adjudged and decreed that W. J. W., the present sheriff of — county, be and he is hereby appointed as a special master commissioner herein, and is hereby ordered and commanded that in case the defendants last above named, except the defendant J. G. W., fail for — days from the entry of this decree to execute to plaintiff a deed conveying said premises in the petition described and all their claim, right and interest thereto, that he, as such special master commissioner, by good and sufficient deed, convey to the plaintiff, the premises in the petition and in this entry described.

No. 1182.

Decree Quieting Title.

[Caption.]

Now comes plaintiff, by her attorney, and the defendants having all been legally served with summons or by publication, and all being in default for answer and demurrer, and after the examination of witnesses for plaintiff the court finds that the allegations of the petition are confirmed by them and proved to be true.

The court finds that at the time of bringing this action the said plaintiff was in possession of the real property described in the petition, and that she had a legal estate and was entitled to and in possession of the same; that neither of the defendants, nor any of them, have any estate in or are entitled to the possession of said real estate or any part thereof, and that the plaintiff ought to have her title and possession quieted as against each and every one of said defendants, as prayed for in the petition.

It is therefore ordered, adjudged, and decreed that the title and possession of said J. W. H. to all and singular the premises described in the petition, to wit: [*here follows the description of the real estate*], be and the same hereby are quieted as against the defendants, and each and every one of them, and all persons claiming under them or any of them, and they are hereby forever enjoined from setting up any claim to said premises or any part thereof adverse to the title and possession of said J. W. H., his heirs or assigns thereto.

No. 1183.

Subrogating Purchaser to Right of Lienholders, at Sheriff Sale—
Lien for Permanent Improvements allowed—Finding against
Lienholders for Resale of Premises, because of Want of Tender—Quieting Title against Mortgage.

[Caption.]

This day this cause came on to be heard and was submitted to the court upon the petition and evidence, the defendants having been duly served with summons and being in default for answer or demurrer in the case, and the court finds that the averments of the petition are confessed and proven to be true and that the equities of the case are with

the plaintiff; and the court further finds that in the case heretofore pending in this court and known on the records of this court as case number —, there was a decree and order of sale entered in favor of the plaintiff in said case number —. That said order of sale was issued to the sheriff of — county, Ohio, and that in pursuance of said order the said sheriff caused the real estate described in the petition to be appraised and advertised for sale according to law, and that on the — day of —, 18—, said real estate was offered for sale at — public vendue by said sheriff, and that at said sale the plaintiff, M. G., was the highest bidder, and that said real estate was struck off by said sheriff to her, and that afterwards, on the — day of —, 18—, said sale was approved and confirmed by the court, and the said sheriff was ordered to make delivery to the plaintiff according to the forms of law, conveying said premises to the plaintiff, and that in pursuance of said last-named order said sheriff did make, execute and deliver such deed, and did convey to the plaintiff, her heirs, and assigns, said real estate situate in said county and state aforesaid, and in the city of —, and known as follows: [*here give description.*]

The court further finds that at the date of said sale there remains on said real estate set up in the case, prior to the mortgage of the defendant F. O., alleged in the petition, liens to the amount of \$—; that said liens were paid out of the purchase money of said premises by the plaintiff to the sheriff of said county, to the extent of \$—, and that the remainder thereof, amounting to \$—, not set up in the case, were paid by the plaintiff for the protection of her title in and to said premises, out of her own money and means, and that all said liens, amounting to \$—, were assigned to the plaintiff, who is the owner thereof, and that plaintiff as the purchaser of said real estate is subrogated to the rights of all said lienholders so paid by her as aforesaid; that the plaintiff, having paid \$— for the cost, and erection, and construction of permanent improvements on said real estate since the day of the purchase, and by the conveyance of the same to her, she has a lien thereon for said sum of \$—, prior to the lien of said F. on his said mortgage, and is entitled to be reimbursed to the said sum of \$—, in addition to the said amount of \$—, being the amount of the lien so as aforesaid paid by her.

And the court further finds that before said F. would be entitled to a decree and order of sale of said premises for the resale thereof on his said mortgage, he must tender to the plaintiff the amount of said lien as aforesaid, including the

sum of \$——, the cost of said improvements; that he has not made such tender or offer to pay said sum or any part thereof to plaintiff either before or since the pendency of this action, although he has been duly served with summons and notice of the filing and pendency of the petition in this case, and that he has had his day in court and has waived his right, either in law or equity to hereafter make such tender or offer, and ought not to insist on the enforcement of his said mortgage by suit or otherwise, and that plaintiff is entitled to have her title and right of possession quieted and forever put to rest in her as against said offer of said F. and against any claim he may have in law or equity on account of said mortgage or by the claim thereby secured, and that said mortgage is void as against said plaintiff or her assigns.

It is therefore ordered, adjudged, and decreed that the said mortgage of the defendant F. be and the same is hereby canceled and the title and right of possession of plaintiff in and to said premises is quieted and forever put at rest in her and her assigns as against said mortgage or any claim of any person either at law or equity, and the clerk of this court is ordered to place on the record of said mortgage of said F., in the said recorder's office, a cancellation of said mortgage in due form of law, and that plaintiff pay the costs of this proceeding, taxed at \$——.

QUO WARRANTO.

(R. S. Secs. 6760—6793.)

No. 1184.

Entry Allowing Action to be Brought on Relation of Another Person.

[Caption.]

This cause coming on to be heard upon the motion of the prosecuting attorney for leave to institute an action in *quo warranto* in this court upon the relation of E. R. And the court being fully advised grants such motion, and leave is hereby granted to bring said action accordingly.

R. S. Sec. 6763.

No. 1185.**Entry Substituting Member of Bar for Prosecuting Attorney.**

[*Caption.*]

Upon motion, and it appearing to the court that A. B., the prosecuting attorney is absent (*or*, that the office of prosecuting attorney is vacant) (*or*, is interested in said (proposed) action), it is ordered that C. F., a member of the bar, be and he is hereby appointed and substituted in place of said prosecuting attorney, and directed to prosecute this action.

R. S. Sec. 6765.

No. 1186.**Entry of Filing Application Requiring Notice.**

[*Caption.*]

It is ordered by the court that the application filed herein be set for hearing on the — day of —, 18—, and that — days' notice of the hearing thereof be given the defendant, which hearing is set for the — day of —, 18—.

R. S. Sec. 6769.

No. 1187.**Entry Granting Leave to File Petition.**

[*Caption.*]

This cause coming on to be heard upon the application of the relator herein for leave to file his petition, and the court being fully advised grants said application and allows said petition to be filed.

R. S. Sec. 6769.

No. 1188.**Entry of Judgment in Favor of Incumbent in Office.**

[*Caption.*]

This day this cause came on for hearing on the pleadings, evidence and arguments of counsel. And the court being fully advised in the premises finds therefrom in favor of the

defendant and against the relator; that the said defendant [name] has not intruded into or usurped the office of [title], but that under and by virtue of the (appointment, or, election), in his answer set forth and alleged, he is entitled to hold such office and perform the duties thereof until the — day of —, 18—.

No. 1189.

Entry of Judgment in Favor of Claimant and Ouster.

[Caption.]

This day this cause came on for hearing upon the pleadings, evidence and arguments of counsel. And the court being fully advised finds therefrom in favor of the relator and against the said defendant; (a) that the said [name] is entitled to the office of [title] by virtue of the (appointment, or, election), alleged in said petition, and that the said defendant is guilty of intruding into said office.

It is therefore considered and adjudged by the court that the said [name] be and he is hereby declared entitled to said office, and that the defendant [name] be and he is hereby ousted and excluded from said office and all its privileges and emoluments. It is further ordered that the relator recover from the defendant his costs herein expended.

R. S. Sec. 6764.

No. 1190.

Entry of Judgment Against Director of Corporation.

[Caption.]

[Proceed from (a) in ante 1189]; that at the election of the directors of said corporation illegal votes were received (or, rejected), which were sufficient to have changed the result of such election; [then the entry in ante No. 1189 may be followed from (a).]

R. S. Sec. 6775.

No. 1191.

**Entry of Judgment Against Director of Corporation—Ordering
New Election.**

[Caption.]

[*Proceed from (a) in ante No. 1189, and with the allegation in ante No. 1190.*]

It is therefore considered and adjudged by the court that a new election be held by the stockholders of said corporation for said office of director on the — day of —, 18—, and that notice of the time and place of said election be given according to law, and that a duly certified copy of this order be served upon the secretary of said corporation.

R. S. Sec. 6776.

No. 1192.

**Entry of Judgment Ousting Corporation of Franchise
or Privilege.**

[Caption.]

This cause came on to be heard upon the information, plea, replication, and demurrer to the replication, and arguments of counsel. On consideration whereof the court finds that the defendant, the said —, has, as alleged in the information, (a) and admitted in the plea, exercised the franchise and privilege of charging meter rent, and for measuring gas, etc.; and that the defendants exercise said franchise and privilege contrary to and without authority of the law of the state of Ohio.

Wherefore it is ordered, adjudged and decreed that said defendant, The —, be and is hereby ousted from exercising said franchise and privilege of charging meter rent, and for measuring gas when the amount consumed is over five hundred cubic feet per month, and that said relator recover of said defendant his costs herein expended to be taxed.

R. S. Sec. 6780.

No. 1193.

Entry of Judgment when Corporation has forfeited Rights—
Dissolving same.

[*Caption.*]

[*Proceed from (a) in ante No. 1192.*] [*State facts showing acts done or omitted*], by reason whereof the said defendant corporation has surrendered (*or*, forfeited) its corporate rights, privileges, and franchises.

Whereupon it is ordered and adjudged by the court that defendant corporation be and it is hereby excluded from all its corporate rights, privileges, and franchises, and that its charter be revoked and annulled, and that said corporation be dissolved. It is therefore further ordered that [*names*], be and they are hereby appointed trustees of the creditors and stockholders of said corporation, and that they enter into a bond in the sum of \$——, conditioned according to law, with sureties to the approval of the court, and that they thereupon proceed to properly pay and apply all money coming into their hands as such trustees, and settle all the affairs of said corporation, collect and pay all outstanding debts, and divide among the stockholders the money and other property which may remain after payment of debts and necessary expenses.

R. S. Sec. 6781.

No. 1194.

Entry approving Report of Trustees.

[*Caption.*]

This cause coming on to be heard upon the report of the trustees heretofore appointed herein to close up and settle the affairs of the defendant corporation, and the court finding it in all respects regular and correct, approves and confirms the same, and allows the expenses and fees and compensations as therein specified. It is further ordered that the said trustees be and they are hereby discharged from their said trust.

No. 1195.

Entry granting Injunction against Directors from disposing of Assets.

[*Caption.*]

Upon motion of —, and good cause being shown therefor, an injunction is hereby granted against the directors [*names*], of said defendant corporation, restraining them from making any disposition of the assets of said corporation prejudicial to the interests of the stockholders thereof before the final termination of this action.

R. S. Sec. 6786.

No. 1196.

Entry requiring Directors to give Security.

[*Caption*]

Upon motion of the relator, and upon satisfactory proof that the directors of the defendant corporation have violated (*or, are about to violate*) the privileges and franchises of said corporation, it is therefore ordered that the said [*names of directors*] enter into a bond of security in the sum of \$—, with sureties to be approved by the court, conditioned for the proper discharge of their duties, and for the proper management and security of the assets of said corporation. And it is further ordered that said directors be enjoined, during the pendency of these proceedings, from paying out or issuing the notes of circulation of said bank, and from incurring any additional liabilities, except for the payment of the necessary services of the employees and officers thereof.

R. S. Sec. 6787.

No. 1197.

Entry of Judgment for Defendant.

[*Caption.*]

This cause came on to be heard upon the pleadings, evidence, was argued by counsel, and submitted to the court, on consideration whereof the court finds upon the issue joined herein for the defendant.

It is therefore ordered that the petition be dismissed, and that the defendant go hence without day, and that he recover his costs from the relator.

REAL ACTIONS.

See QUIET TITLE—ACTIONS TO, OCCUPYING CLAIMANTS,
RECOVERY OF POSSESSION OF REAL PROPERTY.

RECEIVERS.

(*R. S. Secs.* 5587—5593.)

Receivers have such powers usually as are conferred by the court appointing, to bring and defend actions, to take and keep possession of property, to receive rents, collect, compound for, and compromise demands, make transfers, and do generally such acts concerning the property placed in their hands as may be directed by the court. *R. S. Sec. 5590.*

The statute does not prescribe any mode of procedure, but it is governed entirely by the orders of the court, and the course pursued in the settlement of the affairs placed in their hands is, by analogy that followed in the settlement of the affairs of estates of insolvent debtors.

(a) APPOINTMENT OF RECEIVER.

No. 1198.

**Appointment of Receiver where notice has been given of
Application.**

[*Caption.*]

This day this cause came on to be heard upon the application, motion, and notice of application for the appointment of receiver, and the same being argued by counsel was submitted to the court. Whereupon the court doth find that notice to the defendants of the application for the appointment of a receiver has been duly given to them, and of the time and place of the hearing thereof. And the court being fully advised in the premises finds that a receiver ought to be appointed as prayed for, etc. [*proceed as in No. 1201 post, from (a)*].

No. 1199.**Entry of Appointment where notice is dispensed with.**

[*Caption.*]

This cause coming on to be heard upon the application and motion of plaintiff herein for the appointment of a receiver herein, as prayed for in said petition, and the court, for good and sufficient reasons, dispenses with notice of said application (*or*, and the court, being of the opinion that notice to the defendants of this application would destroy the rights of plaintiff herein, the same is hereby dispensed with), and being fully advised in the premises finds that a receiver ought to be appointed as prayed for, etc. [*proceed as in No. 1201 post, from (a)*].

NOTE.—As to when notice should be given see Beach's Eq. Pr., Sec. 730.

No. 1200.**Receiver—Time of hearing for Appointment of postponed, and Injunction allowed.**

[*Caption.*]

Upon plaintiff's application for a temporary injunction and for the appointment of a receiver, it is ordered that the hearing as to appointment of a receiver be continued until —, and the sheriff be directed to so notify forthwith the defendants, and all of said defendants and their agents and employees are restrained from disposing, selling, transferring, or carrying away any of such property until further order, upon plaintiff giving bond, etc.

No. 1201.**Appointment of Receiver of Corporation.**

[*Caption.*]

This day this cause came on to be heard upon the motion of the plaintiff for the appointment of a receiver herein, and upon good cause shown therefor (*a*) it is therefore ordered that J. C. be and he is hereby appointed receiver of all the property, real and personal, equitable interests, and things in action belonging to said defendant, wheresoever the same may be found or situated, and the said receiver, upon being duly

qualified according to law, is ordered to take charge of all and singular the property, books, accounts, and papers of said company, and to have exclusive charge of the business and affairs thereof, and proceed to collect all debts due said corporation, and adjust the same, and to collect all amounts due on account of subscription to the capital stock of said company, by suit or otherwise as may become necessary, and make report to this court of the same, together with a schedule of all the debts and liabilities of said corporation for further order in the premises. And it is further ordered that the said defendant corporation, and all officers and agents thereof, and all other persons having any of said property, books, or papers of said corporation in their possession, or under their control, deliver the same to the said receiver, and that all persons indebted to said defendant corporation pay said indebtedness to said receiver, and it is ordered that before entering upon his duties as such receiver the said J. C. execute an undertaking according to law, in the sum of \$—, with sureties to be approved by the clerk of this court.

Now comes the said J. C. and presents his undertaking herein, with — as sureties, which said bond and undertaking is approved by the clerk of this court, and the said J. C. was duly sworn as receiver, according to law. It is further ordered that said receiver proceed to cause an inventory and appraisalment to be made of said property upon the oaths of —, —, and —, and that he give notice of his appointment by publication in a newspaper of general circulation.

Kinds of property over which receiver may be appointed. Beach on Eq. Pr., Sec. 719.

No. 1202.

Appointment of Receiver to collect Rents and Profits of Property pending Suit.

[Caption.]

This day this cause came on to be heard on the application of F. C. M. to appoint a receiver to collect and preserve the rents and profits of the premises described in plaintiff's petition, and the court being fully advised in the premises finds that it is necessary that a receiver be appointed to preserve the said rents and profits of said premises, as prayed for in defendant's, F. C. M., cross petition, and hereby appoints L. G. A. to act as such receiver, and fixes his bond at \$—.

No. 1203.**Entry of Appointment of Receiver to take non-exempt Property of Judgment Debtor (under R. S. Sec. 5484).**

[*Caption.*]

It having been made satisfactorily to appear to the court that the defendant judgment debtor has certain property which is not exempt to him under the law, as disclosed by the examination made herein, and which can not be directly applied to the satisfaction of plaintiff's claim, and the court deeming it for the best interests of the parties hereto, therefore appoints E. W. receiver of said property, to wit: [*give sufficient description of property*], who is hereby directed and empowered to take charge of said property, and said defendant is directed and required to turn the same over to said receiver, who is hereby ordered and directed to convert said property into money, and to hold the same subject to the further orders of the court; and that said receiver enter into a bond in the sum of \$——, with sureties to the approval of the clerk of this court.

No. 1204.**Entry of Appointment of Receiver to take charge of Attached Property.**

[*Caption.*]

Upon motion of plaintiff herein, and good cause therefor being shown, it is by the court ordered that T. F. be and he is hereby appointed receiver herein to take charge of the property so levied upon by virtue of the writ of attachment herein, and that the said T. F. enter into a bond as such receiver in the sum of \$——, with sureties to the approval of the clerk of this court. And it is further ordered that the said receiver take possession of said property, care for, and do all things proper to be done under the further orders of the court, and any further orders that the circumstances may require.

R. S. Sec. 5539.

No. 1205.

Appointment of Receiver to Investigate the Death of Person suspected of having committed Suicide—Application made by Accident Association.

[*Caption.*]

This day came the N. E. M. Accident Association, of —, and filed its petition, duly verified, with the clerk of this court, reciting the fact that on or about the — day of —, 18—, one G. E. W. died in the county of — under such circumstances as leads the applicant to believe that his death was caused by suicide, and not the result of unforeseen accident, or of natural causes, and it appearing to the court that the circumstances of said death are of such character as would justify the fullest inquiry therein on the part of said applicant, and the court further finding that the said applicant has fully complied with the terms and conditions required in such cases by Sec. 5874, Revised Statutes of Ohio, hereby orders that the witnesses named in said petition be examined under oath, and their answers obtained to the questions outlined in said petition, and the court further orders that such examination shall take place at the — in —, beginning at — o'clock on — day of —, 18—, and continuing from day to day until same is completed.

And the court further orders that, if necessary, said witnesses shall be notified by subpoena issued by special officer appointed herein, which subpoena shall be addressed to said sheriff of said county, and said sheriff is hereby ordered to serve said subpoena and obey the orders that may be issued to him by the said special officer appointed herein to enforce the attendance of said witnesses so that the testimony of said witnesses named herein may be properly obtained. Said witnesses shall have two hours' notice of such examination before they testify, if they desire such amount of time. Said witnesses are hereby required to answer fully and satisfactorily questions given in said petition, and each and every one of said witnesses are hereby ordered to exhibit for the inspection of said special officer, on application herein, and the attorneys, any papers, books, or written instruments in their possession, or under their control, that may in any way throw light on the manner of life or the circumstances of the death of said decedent. Said applicant is hereby directed to give one day's notice of the taking of said testimony to the administrators of said decedent, and the court hereby appoints

L. P. M., a notary public of — county, Ohio, as a suitable person and special officer, and authorizes him to proceed to take the testimony of said witnesses as above ordered, and to secure such testimony he is given full authority to issue such subpoenas and other writs as may be necessary for this purpose, and when said testimony is so taken said special officer is ordered to make due return thereof to the clerk of this court, and said applicant is hereby ordered to pay all of the costs of the proceedings herein.

No. 1206.

Following is Bond required in the foregoing proceeding in Appointment of Receiver.

[*Caption.*]

Whereas W. W. B. was on the — day of —, 18—, duly appointed a receiver in the case of J. E. M., plaintiff, vs. A. P., *et al.*, defendants, now pending in the court of common pleas, within and for the county of —, and state of Ohio; now,

Therefore we, W. W. B., as principal, and B. S. B., as surety, undertake to the state of Ohio in the sum of \$— that the said W. W. B. shall faithfully discharge the duties of receiver in the said action and obey the orders of said court therein.

[SEAL.] W. W. B.

[SEAL.] B. S. B.

I approve the above undertaking and the surety therein.
—, Clerk of the Court.

No. 1207.

Receiver—Application for, Denied.

[*Caption.*]

This cause coming on to be heard upon the application of the plaintiff for the appointment of a receiver, and the evidence therein adduced, the court finds that the appointment of a receiver would involve great expense that would overcome any advantage thereby accruing if a trial on the merits of the case can be had at a speedy day, and therefore denies the said application, but said denial is on the condition that an issue can be made by the defendant without delay so that this action may be heard at this term

of court, and if such is not done, then this plaintiff may renew his said application and this court will give further consideration thereto.

No. 1208.

Entry of appointment of Receiver in Foreclosure to receive Rents and Profits.

[*Caption.*]

This cause coming on to be heard upon the application of plaintiff herein for the appointment of a receiver herein to take charge of the property involved herein, and it appearing that due and proper notice has been given of said motion, and it appearing that the mortgaged premises are an inadequate security for the mortgage indebtedness herein of plaintiffs, and to satisfy the claims of the defendant lienholders, and that no one but the defendant, —, is liable for said debts, it is ordered that A. R. be and he is hereby appointed receiver herein, with the usual powers and directions of all the rents and profits now due and unpaid arising from the said premises, or to become due pending this action; that said receiver be and he is hereby directed and empowered to demand, collect and receive from the tenants in possession all the rents due and unpaid or hereafter to become due. And the said receiver is hereby also authorized to rent said premises for terms as the court may approve, and to keep the same in repair and insured against loss by fire, and to pay the taxes, assessments, and water rents thereon as the same mature, and to hold the funds arising from the rents and profits of said premises subject to the further orders of this court.

R. S. Sec. 5587.

No. 1209.

Entry of appointment of Receiver for Partnership Property.

[*Caption.*]

This cause coming on to be heard upon the application of — for the appointment of a receiver herein, and it appearing that all the parties hereto have been duly notified hereof, and it appearing that the best interests of the said parties require the appointment of a receiver herein as asked for, it is therefore considered and ordered by the court that R. E. be appointed with the usual powers and duties of the partnership property, assets and effects of the firm of A. B. &

Co., and that said receiver enter into a bond in the sum of \$——, with sureties to be approved by the clerk of this court, and that said receiver, when he has duly qualified as such, shall forthwith take possession of the property of said partnership, and that the said parties hereto and members of said firm deliver and transfer the same and all the partnership books and papers and effects belonging to said partnership to said receiver; and that said receiver complete all unsatisfied contracts of said partnership, but that he shall not enter upon any new contracts as such receiver, and that he shall convert the said property and assets of said partnership into money, and recover and collect all claims, demands, bills, accounts, by suit or otherwise, belonging to said partnership, and hold the same and all funds coming into his hands subject to the further orders of the court.

No. 1210.

Entry Removing Receiver and Appointing Another.

[*Caption.*]

[*Preliminary recitals as occasion requires.*]

It is therefore ordered that the said E. S. be and he is hereby removed from the office of receiver of the defendant corporation [*or, herein*], [*state grounds of removal*], and that A. R. be and he is hereby appointed receiver of ——, with the powers and duties conferred by the order heretofore entered herein on the —— day of ——, 18—— [*or they may be specified*].

It is further ordered that before entering upon the discharge of his duties as such receiver the said A. R. enter into a bond as such receiver in the sum of \$——, with sureties to the approval of the clerk of this court. That upon the filing and approval of said bond the said E. S. shall deliver to the said A. R. all the property and assets belonging to the said defendant corporation [*name*], [*or, of defendant herein*], which have heretofore come into his hands as receiver herein.

As to removal see, fully, Beach's Eq. Pr., Sec. 749. When appointment is made without notice. *Id.*, Sec. 730.

No. 1211.

Entry authorizing Receiver to give notice by Publication to all Creditors, requiring their Claims to be presented within six months therefrom (as in assignments, R. S. Sec. 6352).

[*Caption.*]

It is ordered by the court that the said A. C., receiver herein, of —, give a notice of his appointment in a newspaper of general circulation in the county, for three consecutive weeks, to the creditors and all persons interested in the — company, and that all persons having claims of any kind are required to present the same, duly verified, to the said receiver for allowance, within six months from the date of the first publication of said notice; and that any who fail to present their claims before final distribution of the assets of said — company is made by said receiver (*or*, within said time), that they will be precluded from any distribution so made by said receiver herein.

NOTE.—There is no statute in Ohio, and it is presumably within the discretion of the court, as to when a creditor shall be barred. Some time ought to be fixed, and that prevailing in assignments for the benefit of creditors ought to be reasonable. But if a creditor should not present his claim to the receiver within the time specified in the entry, but before distribution is actually made, he would undoubtedly be entitled to share therein; for it has been held to be within the discretion of the court, in the absence of statutes, to let the claim in. *Attorney General v. Insurance Company*, 11 Abb. N. C. 139; 96 N. Y. 49; *People v. Ins. Co.*, 79 N. Y. 267.

No. 1212.**Report of Liabilities by Receiver.**

[*Caption.*]

This day came J. W., heretofore appointed receiver in this case of the property of the — company, and makes report to the court of the liabilities of the said — company, showing that the total liabilities of said company amount to the sum of \$—.

It is therefore ordered that said report be filed with the other papers in this case, and be made a part of the record herein.

(b) SALES BY RECEIVER.

No. 1213.**Entry ordering Receiver to sell Real Estate.***[Caption.]*

This cause coming on to be heard upon the application of A. C., receiver herein, for authority of court to sell the real estate in his said application described, and in his hands as such receiver by order of this court, and belonging to the said [defendant], — company, and it appearing to the court that it will be for the best interests of said trust and the parties interested therein, it is ordered by the court that the said receiver cause said premises to be appraised by the oaths of —, —, and —, three disinterested freeholders of the vicinity, and that when said premises shall have been so appraised the said receiver shall proceed to advertise said premises for sale by publication in some newspaper of general circulation in the county for four consecutive weeks, and that he then proceed to sell the same at public auction (upon the premises) or, at the door of the courthouse, at not less than two thirds of the appraised value thereof, upon the following terms, to wit: *[state terms]*, and report his proceedings hereunder to the court for further orders.

No. 1214.**Receiver ordered to sell Real Estate and Personal Property—
Common Form of Entry.***[Caption.]*

This day this cause came on to be heard upon the motion for an order of sale, and the court having heard the evidence submitted by the parties thereto upon the said motion, as well as the arguments of counsel, and having carefully considered the same, and being fully advised in the premises, finds that it is for the best interests of the creditors, as well as for all other parties interested in this suit, that a sale of the real estate and other property in the hands of the receiver herein should be made at this time.

It is therefore ordered that said receiver shall proceed without delay to appraise, advertise, and sell all of the property in his hands, including the real estate and furniture, as

well as the machinery and other property connected with the business of the said defendants and embraced in the orders by which said receiver was appointed herein, as well as the other orders of the court herein and now in his possession and under his control as such receiver, upon the following terms, to wit:

One third of the purchase price to be paid in cash on the day of sale; one third thereof in two (2) years after date, the deferred payments to bear interest at — percent per annum, and to be secured by mortgage upon the real estate and other property so sold, and said receiver is ordered to make due return of his proceedings hereunder, and to bring the purchase money into court for further order herein.

No. 1215.

Order to sell Stock of Goods by Retail at Private Sale.

[*Caption.*]

Upon application of the receiver herein, and it appearing to the court that it is to the best interest of all the parties herein that the stock of goods of the firm of —, and included in the schedule heretofore filed in this case, now in his hands, be sold at private sale, he is hereby directed by the court to sell the same at retail, and to continue such sales until the further order of this court.

No. 1216.

Entry ordering Public Sale of Personal Property.

[*Caption.*]

Upon application of A. C., receiver herein, of [*name*], it is ordered that said receiver be and he is hereby authorized and ordered to proceed to advertise for — weeks by publication in some newspaper of general circulation in the county, and sell the said property in his said application mentioned at public auction, and report his proceedings to this court.

No. 1217.**Entry authorizing Sale of Personal Property at Private Sale.**

[*Caption.*]

Upon motion and application of A. C., receiver herein, and it appearing that it will be for the best interests of the parties in interest that the said property mentioned and set forth in said application of said receiver to sell the same at private sale at and for the price offered therefor in cash, it is therefore ordered by the court that the said receiver proceed to sell the said property in said application mentioned and set forth at private sale at the best price he can obtain therefor in cash, not less than \$——, and hold the proceeds subject to the orders of this court.

No. 1218.**Confirmation of Private Sale of Property by Receiver.**

[*Caption.*]

This day came J. W., receiver heretofore appointed in this case, and made report to the court that in pursuance of a former order of this court he made a private sale of the remainder of the property belonging to the late —— company in his hands, as shown by said order of L. H. for the sum of \$——, and the court upon investigation thereof finds that said sale has in all respects been made in accordance with the orders of this court, and according to law.

It is therefore ordered and adjudged by the court that said sale so made and reported as aforesaid be and the same is hereby approved and confirmed.

No. 1219.**Entry Confirming Sale of Real Estate by Receiver.**

[*Caption.*]

This cause coming on to be heard upon the report of A. C., receiver of —— company herein, of a sale of the real estate belonging to said company, in pursuance of a former order of this court, and the motion to confirm the same, and the court having carefully examined said report and being satisfied that said sale has in all respects been made in con-

formity to law and the order of this court, it is ordered by the court that said sale be and the same is hereby approved and confirmed, and the said receiver is hereby authorized to convey to said purchaser, —, the following described real estate belonging to the said — company, upon receipt by said receiver of the purchase money for said real estate [*description*], and that he hold the funds arising therefrom subject to the further orders of the court.

No. 1220.

Entry confirming Report of Sale of Personal Property.

[*Caption.*]

This matter coming on now to be heard on the report of sale of certain horses, cows, etc., to — for the sum of \$—, all which is more particularly described in the report, and it appearing to the court that said sale has been made for the highest and best price that could be obtained for the same, and that it will be for the best interest of all concerned to have the same consummated,

It is therefore ordered and adjudged that said sale be and the same is hereby confirmed as to each and every item of the same, and the receiver is hereby ordered to deliver to said — the said personal property on payment of the purchase price thereof.

(c) SALE OF DESPERATE CLAIMS.

No. 1221.

Receiver Authorized to Sell Desperate Claims.

[*Caption.*]

This day this cause came on for hearing on motion of receiver for an order to sell at public sale certain desperate claims and uncollectible judgments therein stated, and was submitted to the court; and the court finds that the claims and judgments stated in the motion of the receiver this day filed are of such a character that they are not at present collectible, and that it would be to the best interest of the trust that said accounts and judgments be by the receiver advertised and sold at public auction. It is therefore by the

court here ordered, adjudged and decreed that the said receiver proceed to advertise and sell at public sale said desperate claims and uncollectible judgments according to law, and that said sale be made on the premises where the late partnership conducted its business.

**(d) AUTHORITY TO RECEIVER TO DO
THINGS IN FURTHERANCE
OF TRUST.**

No. 1222.

Receiver Authorized to Borrow Money to Conduct Business.

[Caption:]

On motion of receiver of the — company, and the court finding it necessary that said receiver should have the power to borrow money to effectually carry on the business of — company, according to a former order of this court, it is therefore ordered and adjudged by this court that said receiver as aforesaid borrow money necessary for the proper conducting of said business, said sum so borrowed not to exceed the sum of \$——, and that said loan be a first lien on the assets of said — company, except judgment and mortgage lien paid out of the profits of said business or the sale of said assets.

No. 1223.

Receiver Authorized to Lease Property.

[Caption.]

This day this cause came on to be heard upon the application of S. A. M., the receiver of the defendant, heretofore appointed herein, for an order authorizing him to lease and sub-let said premises heretofore operated and conducted by the defendant corporation, and was submitted to the court, and the court being fully advised in the premises finds that said receiver is unable to operate such plant under the order heretofore obtained for that purpose on account of insufficient funds in his hands to put the machinery and other appliances in proper repair to manufacture; and the court further finds that it would be greatly to the advantage of said defendant

corporation and to its creditors to have said plant run and operated and machinery and appliances put and kept in proper condition, and that said corporation and its creditors will be damaged and will suffer large and substantial losses on account of the nature and condition of the property now in the hands of said receiver unless said plant is operated. Wherefore said receiver is authorized and empowered by this court to lease or rent the plant heretofore operated by the defendant — company by the month at the cash rental value stated in said motion, until the further order of this court.

No. 1224.

Receiver authorized to Employ Help and to Sell Property in same proceeding.

[*Caption.*]

Now comes the receiver, W. W. B., heretofore appointed by the court, and says that there has come into his hands as receiver a large number of horses, cattle, hogs, also hay, grain, etc.; that in order to properly care for and protect the property in his hands it will be absolutely necessary for said receiver to employ help to assist in the care thereof, and that it will be necessary for the best interest of all parties hereto that such additional help should be employed. The receiver also represents to the court that the chief and most valuable property in his hands are a large number of horses, hogs, etc.; that it requires a large amount of hay, grain, etc., to feed the same; that in feeding the same from hay and grain on hand, the value and amount of property on hand is continually depreciating, and that it will be for the best interest of all parties hereto that the receiver be authorized to sell for cash for the best prices that he can obtain, the property in his hands either at private or public sale. But in case the property is sold at public sale, public notice ought first be given for at least thirty days before date of sale.

And said receiver also asks for an order from the court authorizing him to employ an assistant in the care and protection of the property in his hands at a salary not to exceed \$—— per day, during the time he is employed, and for an order authorizing him to immediately sell the property in his hands for cash or best prices obtainable by him either at private or public sale, but in case of public sale, notice for thirty days shall be first given before date of sale.

And the court coming now to a hearing of said application of said receiver to employ help and sell goods and chattels,

and upon the evidence doth find the facts and matters in said application to be true, and that it will be for the best interest of all persons concerned herein that said receiver employ help and sell goods and chattels as prayed for.

It is therefore by the court considered and ordered that the receiver be and he is hereby authorized to employ help to assist in the care and protection of property in his hands at a salary not to exceed \$—— per day, until further orders by this court.

It is further by the court considered and ordered that the receiver be and he is hereby authorized to immediately commence the sale of property in his hands either at private or public sale, all sales however to be for cash or the best prices obtainable by said receiver, provided where property is sold at public sale, public notice shall be given for at least thirty days before date of sale.

No. 1225.

Receiver—Same Proceeding—Entry Authorizing Receiver to Deliver Property to Judgment Lienholder.

[*Caption.*]

Now comes W. W. B., receiver herein, and represents to the court that he has in his possession certain [*describe property*], named ——, which the —— bank of ——, who have heretofore obtained a judgment against defendant A. P., in this court, for \$——, are ready and willing to accept from this receiver in full satisfaction of their aforesaid judgment. This receiver represents that said price is much larger than can otherwise be obtained, and asks for an order authorizing him to deliver said property to said —— bank of ——, in consideration of said bank entering satisfaction of said judgment.

And the court coming now to a hearing of said application, finds the matter set forth therein to be true, and the court finding that all parties having any interest in said property having consented to the release of their lien or liens upon said property, subject to other releases and reservations as hereinafter ordered by the court.

It is therefore by the court considered and ordered that said receiver be and he is hereby authorized to deliver to said —— bank of ——, said property upon a judgment by them obtained against said A. P. being satisfied, and it is further ordered that the liens of all parties hereto on said property be and the same are released subject to the reservations hereinafter ordered.

And it is further ordered by the court that such release of said property shall in no way operate as a release of any lien or liens, or any part thereof, which any party or parties hereto may have by reason of any attachments or otherwise, on any of the other property now in the hands of such receiver. And it is further ordered that such release of such property shall in no way reduce the amount of judgment of any attaching creditor, and shall in no way prejudice, or prevent such attaching creditor from securing the full amount of his judgment from the remainder of any property in the hands of such receiver, and on which he may have any attachment lien or liens. This order shall in no way be construed as a finding by the court upon the priorities of any lien or liens which may now be on said property, or upon any other property in the hands of said receiver.

No. 1226.

Receiver Ordered to Pay Taxes.

[*Caption.*]

This day this cause came on to be heard on the application of the receiver herein for an order authorizing him to pay taxes assessed on the property of the late — company, amounting to \$—, and was submitted to the court, whereupon the court finds that there is due the county treasurer of —, as taxes on the personal property of the late — company, the sum of \$—.

It is therefore ordered that the receiver, out of the money now in his hands, pay to the said treasurer the said taxes, amounting to the sum of \$—.

No. 1227.

Receiver Authorized to Begin an Action to Enforce Judgment.

[*Caption.*]

Upon application of G. B. O., receiver herein, he is hereby authorized and directed to commence an action in his own name as such receiver, to subject the property of B. F. S., deceased, to the payment of the judgment rendered by — court on the — day of —.

No. 1228.

Receiver Granted Authority to Manufacture and Sell Stock on Hand.

[*Caption.*]

This day came L. W. H., receiver, and filed with the court his report touching certain work now on hand and in his possession as receiver, and asking for permission of the court to complete such goods as are now partially manufactured, and to manufacture the residue of material on hand into manufactured goods, and for authority to purchase such material as is necessary to complete said work. The court being fully advised in the premises finds that it would be best for all parties concerned to grant said application, and the same is hereby granted, and the said receiver is hereby directed to purchase such new material as he may think proper to partially manufacture, and to manufacture the residue of the stock in his possession into manufactured goods which have been worked up heretofore, and that he proceed to dispose of such goods after being so manufactured at the usual market price therefor as the same were heretofore sold by said partnership; and said receiver is directed to report his proceedings in the premises to the court after his compliance with this order.

No. 1229.

Receiver Ordered to Pay Note.

[*Caption.*]

This day this cause came on to be heard upon the application of the receiver herein for authority to pay a certain promissory note to — for insurance upon the property of the C. P. A. Company, as more fully set forth in said application; and the court being fully advised in the premises, and upon the evidence adduced, finds the statements and allegations contained in said application true, and that said note should be paid, and that it will be for the best interest of the creditors and of the C. P. A. Company to have said note paid now and promptly. Said receiver is therefore authorized, ordered, and directed to pay out of any fund he may have in his hands of said M. B. H. said note, with interest up to the present time, amounting to \$——.

(e) DETERMINATION OF PRIORITIES OF LIENS.

No. 1230.

Receiver—Validity of Chattel Mortgage Determined—Order
to Pay.

[Caption.]

This day this cause came on to be heard upon the pleadings and evidence and argument of counsel, and was submitted to the court, whereupon the court being fully advised in the premises, do find the issues in favor of the plaintiff, and that said plaintiff, by reason of his said chattel mortgage, has the first and best valid and subsisting lien upon the partnership of the late H. & C. and the funds remaining from the sale thereof.

It is therefore this day considered and adjudged that the said answer and cross petition of the E. H. & Co. be and the same is hereby dismissed. The court coming on to distribute the funds in the hands of the receiver, and pass upon his third account filed in this court, do allow and confirm the same; and it is ordered that out of the moneys in his hands he first pay the costs of this action, including an additional allowance to himself as receiver, of \$—, and out of the balance he pay in full the mortgage claim of the plaintiff, amounting to \$—, with interest thereon; and that if there be any balance after paying said claim, he hold it subject to the further order of this court. And thereupon the defendants, E. H. & Co., gave notice of their intention to appeal this case to the circuit court of — county, and asked the court to fix the penalty of an undertaking to be given by them to perfect such appeal, which the court accordingly fixes at \$—.

(f) DISTRIBUTION OF FUNDS.

No. 1231.

Receiver—Order of Distribution in Same Proceeding.

[Caption.]

This day this cause came on to be heard on application of W. W. B., receiver herein, for an order of distribution of

the money in his hands heretofore by him reported to this court; and upon the evidence and pleadings herein, and arguments of counsel, and the court being fully advised in the premises, doth find that the plaintiff, J. E. M., the defendants F. M. G., J. S., E. D., A. K. W., and S. H. S., after the payment of the costs in this case, the receiver's compensation, and attorney's fee to receiver, have the first and best lien on the money now in the hands of the receiver, by reason of their attachment proceedings as set up respectively in the petition of said J. E. M. and the answer and cross petition of the aforesaid defendants. The court further finds that the defendant the — bank of —, obtained a judgment in this court in the — term, 18—, against the defendant A. P., in the sum of \$— and costs, on the — day of —, 18—, as in its answer and cross petition set out. And execution was thereupon issued to the sheriff of — county, Ohio, who, on the — day of —, 18—, levied on the property of defendant A. P., which property was the same as came into the hands of the receiver herein; that the defendant M. C. H. obtained a judgment in this court, in the — term, 18—, against the defendant A. P., in the sum of \$— and costs, on the — day of —, 18—, as in her answer and cross petition set up; and execution was thereupon issued to the sheriff of — county, Ohio, who, on the — day of —, 18—, levied on the property of the said defendant A. P., which property so levied on was the same as came into the hands of the receiver herein; that the defendant, the — bank of C., obtained a judgment in this court at the — term, 18—, against the defendant A. P., in the sum of \$— and costs, on the — day of —, 18—, as in its answer and cross petition set up; and execution was thereupon issued to the sheriff of — county, Ohio, who, on the — day of —, 18—, levied on the property of the said defendant A. P., which property so levied on was the same as came into the hands of the receiver herein; that the defendant W. R. G. obtained a judgment in this court at the — term of 18—, against the defendant A. P., in the sum of \$— and costs, and on the — day of —, 18—, as in his answer and cross petition set up; and execution was thereupon issued to the sheriff of — county, Ohio, who, on the — day of —, 18—, levied on the property of the said defendant A. P., which property so levied on was the same as came into the hands of the receiver herein.

The court doth further find that the defendant, the — bank of —, has been paid in full its aforesaid judgment

by the return of a certain stallion, as per a former order of this court, and has no claim or interest in the money now in the hands of the receiver.

The court doth further find, from the evidence and pleadings, that the defendant J. B. M. has no lien, interest, or claim in or to the moneys now in the hands of the receiver.

The court doth further find that as between the claims and judgments of the — bank of C. and M. C. H. on the one part and the judgment of J. B. on the other, that said judgment of the — bank of C. and M. C. H. are the best and prior liens on said moneys in the hands of said receiver, and should be paid as against said claim of J. B. in full.

The court doth further find, as between the various defendants herein, who obtained judgments in this court in the — term, 18—, and issued execution thereon to the sheriff of — county, Ohio, that all said judgments shall pro rate in the amount that may be payable to the — bank of C. and M. C. H., as between them and J. B.

The court doth further find that the judgment of the said defendant J. B. shall pro rate with the judgment of the defendant W. R. G. in any money that may be payable to the said defendant W. R. G.

And the court coming now to a distribution of the sum of \$—, being the money now in the hands of said receiver, doth order and adjudge that he pay:

Item 1, To the clerk of this court the costs herein, taxed at \$—.

Item 2, To the clerk of this court the costs in the case of — bank of C. against A. P.; the — bank of — vs. A. P.; W. R. G. vs. A. P.; M. C. H. vs. A. P.; W. W. B. vs. A. P.; and J. B. vs. A. P., amounting in all to \$—, to the clerk of the court of — county, Ohio, the costs in the case of J. B. vs. A. P., and others, amounting to \$—.

Item 3, To himself, as his compensation as receiver, \$—.

Item 4, To O. L., M. C. G., attorneys for receiver, the sum of \$—.

Item 5, To the J. E. M., F. M. G., J. S., E. D., A. K. W., and S. H. S., their respective judgments and costs in their actions against A. P., as follows: To J. E. M., \$—; to F. M. G., \$—; to J. S., \$—; to E. D., \$—; to A. K. W., \$—; to S. H. S., \$—.

Item 6, And it appearing to the court that, after the payment of the judgments and costs as provided for in Item 5 herein, there is not sufficient money in the hands of the receiver to pay the judgment taken in this court

and in the court of — county, Ohio, it is further ordered and adjudged that the receiver pay to M. C. H., W. R. G., and W. W. B. and J. B. their *pro rata* share of money in his hands in proportion that their respective claims bear to the moneys in his hands for distribution according to the preceding five classes, which *pro rata* shares are as follows: To the — bank of C., \$—; to M. C. H., \$—; to W. R. G., \$—; to W. W. B., \$—; to J. B., \$—; the payments to W. R. G., W. W. B., and J. B. being, however, subject to Items 7 and 8 herein.

Item 7, That the said defendant J. B. shall *pro rate* on his judgment with the defendant W. R. G. in any sum payable to said W. R. G. under Item 6 herein, in the proportion that the said claim of J. B. and W. R. G. have to the amount so payable to W. R. G. under Item 6 herein, which is as follows: To W. R. G., \$—; to J. B., \$—.

Item 8, And it appearing to the court that the executions issued and levied on the judgment in favor of the defendants W. W. B. and J. B. were subsequent in time to the execution issued and levied on the judgment of the defendant J. B., it is considered by the court that so much of the funds as were set aside to said W. W. B. and J. B. under Item 6 herein, are subject to the superior claim of said J. B., and it is ordered that said amount shall be paid to said J. B. on his said judgment.

No. 1232.

Receiver Ordered to Pay Balance of Claims.

[*Caption.*]

This cause coming on to be heard upon the application of the receiver appointed herein for an order of distribution of the funds now in his hands, and upon due consideration whereof, the court orders that the receiver pay the remainder of the claims of the creditors of the said — company as shown by the schedule of liabilities heretofore filed herein by the receiver, fifty percent of said claims having been by the former order of this court ordered paid.

(g) REPORTS AND ACCOUNTS.

No. 1233.

Report of Receiver Approved—Partial Dividend Ordered Paid.

[*Caption.*]

This cause coming on to be heard upon the motion to confirm the partial report of the receiver herein, and the court having carefully examined said report, and finding the same to be in all respects correct, and that the said receiver has fully obeyed all the orders of the court to him issued, and has duly paid over all moneys coming into his hands as such receiver, does therefore approve and confirm the same; and upon motion of the said receiver it is ordered that he be allowed and paid the sum of \$—, in full for his services herein to date. It is further ordered that all acts and things done by him, as well as his said report, be and they are hereby approved and confirmed, and that the said F. S. be discharged from further liability and responsibility as to all moneys contained in his said report as such receiver. (a)

And the court further finds that there is in the hands of said receiver, upon the allowance of said account, the sum of \$—, and that the indebtedness of said — amounts to the sum of \$—, and that it will be expedient and safe for said receiver to pay a final dividend of — percent. It is therefore ordered that the said receiver proceed to pay to the creditors of said — a dividend of — percent, and report such payment to this court.

No. 1234.

Allowance of Final Account, and Final Dividend Declared.

[*Caption.*]

[*Proceed from (a) in ante form No. 1233.*]

And the court finds that there remains in the hands of said receiver the sum of \$—, and that the remainder of the indebtedness due from the said [*name*] amounts to \$—, and that said sum in the hands of said receiver will pay a dividend upon said debts of — percent. It is ordered by the court that the said receiver pay a final dividend upon the said claims and indebtedness of — percent, and that he report the payment thereof to this court within — days from the date of this entry.

No. 1235.

Entry of Filing of Report of Final Dividend and Discharge of Receiver.

[*Caption.*]

This day came —, receiver of —, and filed herein his report of payment by him of a final dividend to the creditors of said —, according to the former order of this court. And it appearing to the court that said receiver has fully complied with the order of this court, and that he has made a full and complete settlement of the affairs of said —, it is ordered that said — be and he is hereby discharged as such receiver.

RECOVERY OF POSSESSION OF REAL PROPERTY.

(*R. S. Secs. 5781—5785.*)

No. 1236.

Entry of Recoupment in Action for Recovery of Purchase Price of Real Estate.

[*Caption.*]

This cause came on this day to be heard upon the pleadings, and the evidence adduced by the parties, and the arguments of counsel. And the court being fully advised finds that there is due the plaintiff (vendor) from the defendant E. T. (vendee), as claimed in said petition, the sum of \$—, being a balance due upon the sale of the premises set forth and described in the petition, and as part of the purchase price therefor; and the court further finds that said premises were incumbered at the time of the sale by said plaintiff to said defendant T. E. by street assessments for the years of —, when said deed from said plaintiff to said defendant specially covenanted and warranted that said premises were free and clear from all encumbrances, and that there has therefore been a breach in the covenants in said deed, and that the said defendant is entitled to recover upon his counterclaim the amount so paid by him upon said street assessments,

to wit, the sum of \$——, from the said plaintiff, and that he is entitled to recoup against the amount claimed by plaintiff and herein found to be due said plaintiff from the said defendant, as the purchase price for said premises, the amount of said street assessments, to wit, the sum of \$——.

It is therefore ordered that the plaintiff recover from the defendant the balance of said purchase money so found to be due him, after deducting therefrom the said sum of \$——, so found to be due said defendant on account of said street assessments, to wit, the sum of \$——, and that he recover his costs herein expended to be taxed.

R. S. Sec. 5780. Or this entry may be modified where cause is submitted to jury.

No. 1237.

Entry where Defendant is in Default—Without Jury.

[*Caption.*]

This day this cause came on to be heard upon the petition, and it appearing to the court that the defendant has been duly served with process and summons according to law, and is in default for demurrer or answer, and the plaintiff herein having waived a trial by jury, said cause was submitted to the court upon the evidence adduced. On consideration thereof the court finds as alleged in the petition that the plaintiff had, at the time of the filing of his petition, and now has a legal title to the premises in the petition described, and is entitled to the immediate possession thereof, and that the defendant has unlawfully kept said plaintiff out of the possession thereof.

It is therefore considered and adjudged by the court that the plaintiff recover the possession of the said premises, and that an execution issue from this court to place said plaintiff in possession of said premises, and that he recover his costs herein expended.

R. S. Sec. 5781; Kinkad's Code Pleading, Secs. 1046, 1050.

No. 1238.

Entry Impaneling Jury to try Action for Recovery of Real Property.

[*Caption.*]

This day this cause came on to be heard upon the pleadings, and thereupon came the following jury, who were duly

impaneled and sworn according to law, to wit: (*names of jurors*). And said jury having heard the evidence adduced by the parties, the arguments of counsel and the charge of the court, upon due deliberation returned the following verdict, to wit: (*copy verdict*). (*a*)

And thereupon the defendant gave notice of a motion for a new trial.

No. 1239.

Entry Overruling Motion for New Trial, and Judgment upon Verdict.

[*Caption.*]

This cause coming on to be heard upon the motion of defendant for a new trial was submitted to the court. Upon due consideration thereof the court finds said motion not well taken and overrules the same.*

It is therefore considered and adjudged by the court that the said plaintiff has been unlawfully kept out of the possession of the premises in said petition described by said defendant, and that he is entitled to the immediate possession thereof; and that he therefore recover from the said defendant the possession of said premises, and also the sum of \$——, his damages so awarded to him by the verdict of the jury, and also his costs herein expended, to be taxed.

R. S. Sec. 5781.

No. 1240.

Entry upon Verdict for Defendant.

[*Caption.*]

[*Proceed from (a) in ante No. 1238.*] It is therefore considered and adjudged by the court that the said defendant go hence without day and recover from the said plaintiff his costs herein expended, to be taxed.

No. 1241.

Sale by Executor declared Valid in an Action to Recover Possession.

[*Caption.*]

This day came the parties and their respective attorneys, and thereupon this cause, having been regularly assigned,

was submitted to the court without the intervention of a jury, on the pleadings, agreements of the parties, the evidence, exhibits and arguments of counsel, and on due consideration whereof, and being fully advised in the premises, the court finds in favor of A. E. D., defendant, on his answer and cross petition, and against said M. E. F., plaintiff, that the executors of the last will and testament of P. F., deceased, had power thereunder to sell and convey in fee simple and receive the proceeds arising from the sale of the real estate described in the petition of the said plaintiff, and in the answer and cross petition of said defendant; that said defendant is seized in fee simple of said premises, that said plaintiff's claim is a cloud thereon, and said defendant is entitled to have his said title quieted as against the said plaintiff; that the equity of the case is with the defendant; that plaintiff's said claim is null and void and the prayer of the said answer and cross petition ought to be granted.

It is thereupon ordered, adjudged and decreed by the court that the title of fee simple of the defendant to the premises aforesaid, and each and every part thereof be and the same is hereby quieted as against any and all claims or demands of said plaintiff in, to, or against the same, and said plaintiff is hereby forever enjoined from asserting or prosecuting any such claim or demand against the same or any part thereof, and that said defendant recover his costs herein against said plaintiff, taxed at \$——.

REFORMATION, RESCISSION, AND CANCELLATION OF INSTRUMENTS.

No. 1242.

Entry Reforming and Correcting Deed where Mistake in Name is made, and Title quieted.

[*Caption.*]

This cause this day came on to be heard on the petition of plaintiff and the answer of the infant defendants by their guardian *ad litem*, the other defendants being in default for answer or demurrer, and was heard on the proofs. Whereupon the court finds that all the defendants have been duly and legally served with process, or have voluntarily entered their appear-

ance herein and are before the court; and the court having heard the evidence and carefully considered the same, and being fully advised in the premises, finds that the deed referred to in the petition, or the premises therein described, was by mistake and inadvertence made to and in the name of A. J. N. instead of E. A. N.; that the said property was purchased by the said E. A. N. in her lifetime with the means of the estate of the said A. N., deceased, and that she was only entitled to a life estate therein, and that, as alleged in said petition, she is now deceased.

It is therefore ordered, adjudged, and decreed by the court that the said deed referred to in the petition, and dated the —, be and the same is hereby corrected and reformed so as to invest the title of said premises in fee simple in the said E. A. N. in trust for her own use and benefit during her natural life, and after her death seized of the same to be and remain the property of the estate of the said A. N., deceased, and subject to the provisions of his will and title to said premises as against the heirs of said E. A. N. is hereby quieted.

No. 1243.

Reformation of Deed where mutual Mistake made in Clause in Warranty.

[*Caption.*]

This cause came on this day to be heard upon the pleadings and evidence and was argued by counsel, and the court having carefully considered the same, and being fully advised in the premises, finds that the allegations contained in the petition are true, and that by mutual mistake of the parties there was added to the general warranty of the deed referred to in said petition a clause "excepting from the same the taxes that were then a lien for the year 1892, which the grantee agrees and assumes to pay." The court further finds that the deed referred to in the petition should not have contained the clause above referred to, and it is therefore ordered and adjudged by the court that the said deed referred to in said petition, and recorded in deed book number —, page —, of — county, Ohio, records, be and the same is hereby corrected and reformed so that said deed shall not have written therein the following clause: "Excepting from the same the taxes that were then a lien for the year 1892, which the grantee agrees and assumes to pay."

And the court further orders that this decree shall have the force and effect of the reformation of said deed as fully and completely as though said deed had originally been made by the C. E. to the said E. N. with said clause omitted, to which said judgment and decree the defendant excepts.

No. 1244.

Reformation of Deed—Correcting Description.

[Caption.]

[Proceed from ante No. 1243.]

The court further finds that all of the allegations of the petition herein are true, and that on and prior to the — day of —, one J. M. was the owner in fee simple and in possession of the following described premises, to wit: [*Description.*]

The court further finds that on the — day of —, said J. M. and the defendant, S. J. M., his wife, executed and delivered to one R. A. their certain deed of conveyance for the above-described premises and thereby conveyed to said R. A. the said above-described premises which said deed is recorded in deed book number —, page —, of the records of deeds in said county.

The court further finds that by the mutual mistake and inadvertence of the parties to said deed, a scrivener who prepared the same, the description of said premises in said deed were made indefinite and uncertain, as follows: [*Here give erroneous description.*]

The court further finds that said description in said deed is indefinite and uncertain for the reason that the same does not definitely state from what side or portion of said lots numbers — said premises so conveyed by said deed were taken. That the premises described in said deed, and which were not to be conveyed by all the parties to said deed, and which were in fact conveyed by said deed, are the same identical premises first hereinbefore described as being owned by said J. M. on said — day of —, as aforesaid; that immediately after the execution and delivery of said deed the said grantee, R. A., took possession of said premises so first hereinabove described under said deed, and on and thus claiming through subsequent successive conveyances under him have ever since paid the taxes on the same and have used and occupied the same, and have been in the open and adverse possession of the same; that the plaintiffs [*naming them*], are

respectively owners of a portion of said premises first hereinabove described in fee simple, and in possession and occupancy of the same, and are entitled to have the description of said deed corrected and reformed, and that the said description in said deed should be reformed so as to locate and identify said premises thereby conveyed and so as to conform the description thereof to the defendants a certain description first hereinabove set forth.

It is therefore ordered, adjudged, and decreed that the said description in said deed be and the same is hereby corrected and reformed so as to locate and identify said premises thereby conveyed, and so as to conform the description thereof to the certain and definite description as hereinabove set out as follows, to wit: [*Here give correct description.*]

The court further finds that the plaintiff is the owner in fee simple and in actual possession and occupancy of said premises.

And it is therefore ordered, adjudged and decreed that the title and the possession of the said plaintiff to all and singular premises described be and the same are hereby quieted as against the defendants, and each and every one of them, and all persons claiming under them, or any of them, and they are hereby forever enjoined from setting up any claim to said premises, or any part thereof, adverse to the title and possession of said plaintiff.

No. 1245.

**Entry Correcting Deed—Corrected Deed Ordered Executed—
Motion for New Trial Overruled.**

[*Caption.*]

This cause came up for trial upon the issue joined by the petition, answer, and reply. The evidence of both parties and the arguments of counsel being concluded, the same was submitted to the court, who, upon consideration, find each and all the allegations of the plaintiff's petition to be true.

It is therefore ordered, adjudged, and decreed by the court that the deed or conveyance be corrected as prayed for in the petition, and that that part of the deed which is a description of the property conveyed be so corrected as to read as follows: Situated in the township of —, county of —, and state of Ohio, and known as —.

And it is further ordered that the defendant execute and deliver a deed to J. M., reconveying to him all the lands in-

cluded in the deed in excess of the quantity of land hereinbefore described, which said lands to be reconveyed are briefly described as follows: [*Description.*]

And that in default of the execution and delivery of said deed by said defendant to said J. M. within thirty (30) days from the entry of this decree this decree shall operate as such conveyance.

The defendant therefore files its motion for a new trial, and the same having been heard and submitted the court overruled said motion.

To all of which orders, holdings, and decrees the defendant excepts.

No. 1246.

Contract—Reformation of Contract, and Judgment on same as Reformed.

[*Caption.*]

This day came the parties in person and by their attorneys, and by the consent of the parties this cause was submitted to the court upon the pleadings of the parties respectively, the exhibits and testimony upon all the issues herein, and the court being fully advised in the premises finds upon the issues herein for the plaintiff. The court further finds upon the testimony that the contract in writing, a copy of which is set forth in the petition, should be reformed for the reason set forth in said petition; that the contract which was in fact entered into between said parties was in substance that plaintiff should sell and deliver to the defendant a certain team of horses at the agreed price of \$——; that the plaintiff should sell and deliver to the defendant a quantity of building stone at the agreed price of \$——; that the plaintiff, to the satisfaction of defendant, delivered said horses to the defendant, and also delivered to him —— perches of stone; that in consideration of said contract on the part of plaintiff the defendant agreed to convey to the plaintiff the following described real estate: [*Description*], at the agreed price of \$——; that the balance which should be due to the plaintiff from the defendant for the price of said horses and the value of said stone the defendant agreed to pay cash.

The court further finds that the defendant, at or about the time in the petition stated, owed to the plaintiff on said contract the sum of \$——, and that there remains due and unpaid on said indebtedness from the defendant to the plaintiff over and above the agreed value of said real estate the cash so paid as aforesaid, the sum of \$——.

The court further finds from the testimony that said promissory note should, for the reasons in said petition specified, be cancelled and delivered to the plaintiff.

Wherefore the court does, by reason of the finding of the facts aforesaid, order that said written contract be reformed to accord with said findings; that said defendant, G. C. W., convey to the plaintiff, C. O. N., by good and sufficient deed of general warranty, the real estate aforesaid within thirty days from this date, and in default thereof this judgment have the same operation and effect as such deed; that said promissory note be cancelled and delivered to the plaintiff, and that plaintiff recover from the said defendant the sum of \$—, with interest thereon from the — day of —, 18—, together with costs herein expended.

No. 1247.

Entry declaring Deed a Mortgage—Cancelling same.

[Caption.]

This cause came on to be heard to the court upon the pleadings, evidence, and arguments of counsel (the right to a trial by jury being waived by the parties hereto), and the court being fully advised in the premises finds that on the — day of —, 18—, plaintiff was the owner in fee simple of [*describe premises*]; that on the — day of —, 18—, the said S. V. D. executed and delivered to E. D. D. a deed absolute upon its face, thereby conveying to the said E. D. D. said premises; that said deed was and is in fact a mortgage given by the said S. V. D. to the said E. D. D. to save the said E. D. D. harmless against any loss that might or could occur to him by reason of his having become surety for the said S. V. D. upon a note made by him to F. E. H.; and that it was agreed and understood by and between said parties at the time of the execution and delivery of said conveyance that upon payment of said note by said S. V. D. the said S. V. D. should thereupon reconvey said premises to plaintiff. The court further finds that said note has been paid, and that the conditions of their contract have been complied with, and that said S. V. D. is entitled to have said deed, which is in fact a mortgage, annulled and cancelled.

It is therefore ordered, adjudged, and decreed that the said deed of conveyance so made by said S. V. D. to the said E. D. D. for the premises more particularly described [*description*], be and the same is hereby declared a mortgage,

and that said contract and deed be and is hereby cancelled, annulled, and held for naught; that the said S. V. D. is by reason of the premises the owner of and seized in fee simple of the said premises, and that he is entitled to have the same transferred to his name on the grand duplicate of taxable property of said county.

It is further adjudged and decreed that the recorder of — county, O., duly enter the cancellation of said conveyance declared to be a mortgage and the substance of this decree upon the record of said mortgage deed in volume —, p. —, and that the auditor of said county be authorized to transfer said premises on the tax duplicate to the said S. V. D.

No. 1248.

Life Insurance Policy Cancelled of Assignment of Policy of Life Insurance wherein the Assignment was made in Trust but not apparent on Face of Instrument.

[*Caption.*]

This day this cause came on to be heard, and the plaintiff appearing by his attorney, and the said defendant, — Life Insurance Company, failing to appear, and this cause came on to be heard upon the petition, exhibits, and testimony, and was argued by counsel, and the court being fully advised in the premises finds that the equity of this case is with the plaintiff, and that the allegations of said petition are true.

It is therefore ordered, adjudged, and decreed by said court that said paper writing, purporting to be an assignment of said number — in the — Insurance Company, be and the same is hereby set aside and counted for naught, and the said defendant is hereby ordered to cancel upon his book any and all record of the said proposed assignment, and to restore the title and right in said policy, and all its belongings, and all the rights therein contained to the said J. M. M., and to place him as to his said policy in the same position and rights as to the records and books of said defendant as he, the said plaintiff, had before the writing of said proposed assignment, and to cancel upon its said books and records all memoranda of said proposed assignment, and in default of said defendant so doing as herein directed and ordered, then that this decree stand for and instead of such cancellation and acts herein ordered.

REPLEVIN.

(*R. S. Secs. 5814—5831.*)

No. 1249.

Entry ordering Sale of Perishable Property.[*Caption.*]

Upon motion of —, and it appearing that the property herein levied upon is of a perishable nature, and that a sale thereof will be for the benefit of the parties herein, it is ordered that the sheriff proceed to sell the same at public auction, as upon execution, upon the following terms, to wit: [*state terms*]. It is ordered that the sheriff hold the said funds arising therefrom subject to the decision and order of the court.

R. S. Sec. 5820a.

No. 1250.**Entry of Judgment against Plaintiff on Demurrer.**[*Caption.*]

This cause coming on to be heard upon the demurrer to the petition, and the court having heard the arguments of counsel, and being fully advised, sustains said demurrer; and the plaintiff not pleading further, and having failed to further prosecute said action, the court finds upon the evidence adduced by defendant that said plaintiff was not entitled to the possession of said property in the petition described at the commencement of this action, but that the right to the possession thereof vested in defendant. And upon application of said defendant, without the intervention of a jury, the court finds upon the evidence for the defendant, and does assess to the defendant damages for the right of property (*or*, possession) the sum of \$——.

It is therefore considered and adjudged by the court that said defendant recover from the plaintiff said sum of \$——, with his costs herein to be taxed.

R. S. Sec. 5824.

No. 1251.

Entry of Assessment of Damages by Jury after Demurrer sustained.

[*Caption.*]

The demurrer to plaintiff's petition herein having been sustained, and the said plaintiff having failed to further plead, it is ordered that the assessment of damages to the defendant be referred to a jury, and thereupon came the following jury, to wit: [*names*], who were duly impaneled and sworn according to law, and having heard the evidence adduced touching the damages sustained by defendant herein, returned their verdict into court, as follows: [*copy verdict*].

It is therefore considered and ordered and adjudged by the court that the defendant recover from the plaintiff the amount so assessed by the verdict of said jury, to wit, the sum of \$——, together with his costs herein to be taxed.

R. S. Sec. 5824.

No. 1252.

Entry of Judgment against Defendant.

[*Caption.*]

[*Proceed with usual entry, ante 1251, of impaneling and verdict of jury.*]

It is therefore considered by the court that the defendant, in accordance with the verdict so rendered by the jury, is entitled to the immediate possession of said property in his petition claimed, and that the defendant unlawfully detains the same from plaintiff.

It is therefore adjudged by the court that the plaintiff recover from the defendant the sum of \$——, the amount of damages so awarded to him by the jury, together with his costs herein expended to be taxed.

R. S. Sec. 5825.

No. 1253.

Entry of Finding and Judgment for Plaintiff without Jury.

[*Caption.*]

This day came the parties and their counsel, and a jury being waived by both parties, this cause was submitted to

the court by consent of both parties upon the pleadings, exhibits, testimony, and evidence. And the court being fully advised in the premises doth find on the issues joined in favor of the plaintiff, and that the plaintiff at the commencement of this action was the owner and entitled to the immediate possession of the goods and chattels described in the petition herein, and that the defendant wrongfully detained the same from the said plaintiff to the damage of the said plaintiff, in the sum of \$——. It is therefore considered and adjudged by the court that the plaintiff, W. S. Co., recover of the defendants herein the said sum of \$——, together with its costs herein expended, taxed at \$——, and execution is awarded therefor.

No. 1254.

Entry Adjustable to any Finding.

[Caption.]

[Recital of proceeding or entry down to verdict, as under heading "TRIAL BY JURY," continuing]

And said jury having found a verdict upon all the issues of fact for the plaintiff (*or*, defendant), and (where value and damages were assessed) assessed the value of the property at (\$——) —— dollars, and the damages of the (plaintiff) (defendant) by reason of the (taking and) detention of the property at —— dollars, it is therefore adjudged by the court (for possession, or deliver; where delivery has not been had), that the plaintiff recover from the defendant [*name*] the possession of the [*description of property sufficient to identify it*], being the property described in the petition herein, and that (plaintiff) (defendant) recover also of said (defendant) (plaintiff) the sum of \$——, the damages so assessed for the (taking and) detention thereof, and his costs herein expended to be taxed.

(If property be not delivered to plaintiff) that the plaintiff recover from defendant the sum (\$——) —— dollars, the value thereof, with interest from ——, 18——, with his costs, etc.

(If property be in the hands of sheriff) And it is further ordered that the sheriff deliver said property to said plaintiff.

(*Or*, if property goes to one having it in his possession, the following:) and the property having been into the possession of [*proceeding with finding as above*].

It is therefore adjudged that the plaintiff (*or*, defendant) have and retain possession of the personal property described in the petition, and also recover — dollars damages, together with his costs.

R. S. Secs. 5825, 5826. Kinkead's Code Pleading, Secs. 1078-1093.

SALE OF ENTAILED ESTATES.

See CHURCHES.

(*R. S. Secs. 5803—5813.*)

No. 1255.

Entry ordering Sale of Entailed Estate.

[*Caption.*]

This cause coming on to be heard upon the petition herein, and the court being satisfied that all the parties interested herein have been made parties hereto, and have been duly served with process, and that plaintiff has an interest in said premises in the petition described and as therein alleged, and it appearing to the court by satisfactory proof that a sale of said premises will be beneficial to the plaintiff, and that such sale will do no substantial injury to the heirs in tail, the defendants, it is ordered by the court that said premises in the petition described be sold free from the entailment, limitation (*or*, condition) by the sheriff of said county at public auction in the same manner as execution sales are made, and that he report his proceedings to this court.

R. S. Sec. 5805. If the parties consent, that feature may be added to the entry. R. S. Sec. 5806.

No. 1256.

Entry of Confirmation.

[*Caption.*]

This cause coming on further to be heard upon the return of sale by the sheriff, and the motion to confirm the same, and the court having carefully examined said proceedings of said sheriff, and being satisfied that the sale so reported by

the sheriff to — has been in all respects regular and in conformity to the law and order of this court, the same is hereby approved and confirmed.

It is therefore ordered that the said sheriff execute and deliver to the said —, purchaser, a good and sufficient deed for said premises from the entailment set forth in the petition herein. It is further ordered that the said sheriff pay the costs of this proceeding out of the proceeds of said sale, and that [*then follow with an order of investment as provided for in R. S. Sec. 5809*].

SETTLEMENT OR COMPROMISE.

No. 1257.

Settlement of Cause by Payment of a Specific Sum.

[*Caption.*]

This day came the parties to this cause, and settled the matters in controversy by the plaintiff offering to accept and the defendant offering to pay to plaintiff the sum of \$——, in full satisfaction of his claim herein sued upon as against all parties to this action, which said sum is now paid; and it is also further agreed that each party, plaintiff and defendant, pay one half of the costs herein. Whereupon it is ordered and adjudged by the court that this case stand settled upon the terms aforesaid, and that the plaintiff pay to the clerk of this court one half of the costs herein taxed, amounting to \$——, and that the defendant pay the other half of the costs herein taxed, and amounting to \$——, and that a complete record of the papers and pleadings herein be omitted by the clerk.

SPECIFIC PERFORMANCE.

No. 1258.

Entry Decreeing Specific Performance of Contracts.

[*Caption.*]

This cause was heard upon the pleadings and evidence, was argued by counsel, and submitted to the court, and upon

due consideration thereof the court finds on the issues joined in favor of the plaintiff, and that the plaintiff is entitled to the specific performance of his contracts with the defendants, as set forth in the petition and duly approved herein, and that the agreements in the petition mentioned can be fully performed and executed.

It is therefore considered, ordered, adjudged, and decreed by the court that the plaintiff within three (3) days execute and deliver to the clerk of this court for the defendants a proper deed of assignment to the defendants of plaintiff's interest in the patent of the United States, No. —, mentioned in the petition, for the said real estate, and plaintiff may comply with this decree by deposit with the clerk the deed heretofore executed, and tender to the defendants, or by depositing one of same purport executed after this decree is entered, and that the defendants — and — shall, within three (3) days, execute and deliver to the plaintiff W. H. R. a good and sufficient deed, with covenants of general warranty, conveying to said W. H. R. the premises described in the petition, to wit, —, and in default thereof that this judgment and decree have the operation and effect of such deed, and that the clerk have so much thereof as will show the transfer of title of said premises to said W. H. R. entered on the record in the office of the recorder of this county.

NOTE.—The entry must require the plaintiff to comply with his part of the agreement as well as the defendant. *Owens v. Hall*, 13 O. S. 571.

STOCK—STOCKHOLDER'S LIABILITY.

*For other Entries connected with Master's Report see TRIAL
BY MASTER COMMISSIONER.*

No. 1259.

Stockholder's Liability—Report Upon by Master Commissioners—Exceptions Thereto and Approval.

[*Caption.*]

This cause now coming on for hearing upon the report of the master commissioners, to whom the same is heretofore referred, and the exceptions filed thereto by plaintiffs, the

court, upon careful consideration thereof, finds that the exceptions herein filed to the report of the master commissioners are not well taken, and therefore overrules the same; and the report of all matters and findings therein are hereby approved and confirmed as the findings of the court, and upon said report and the testimony offered, the court finds that the amount of the indebtedness of the said the —, a corporation under the laws of Ohio, over and above its assets, is \$—, which includes a counsel fee of \$— to —, and the master fee herein, including his stenographer, of \$—, which sum the court allows in favor of said counsel and said master commissioner.

And the court further finds, from the evidence and report of said master commissioner, that each of the said defendants hereinafter named were, at the time the several liabilities accrued, stockholders of the said the — company, in the amounts found and set opposite their names respectively in the columns of stock in the schedule set out below.

And the court further finds, from the report above named and the evidence, that said corporation is insolvent, and that to pay the liability aforesaid it will require an assessment on the amount of stock held by each and all of the defendants, stockholders, who are solvent and within the jurisdiction of the court, of the sums hereby found and set opposite their names respectively in the column "judgment" in the following schedule, viz. :

\$—.	Per Share.	Stock.	Judgment.
J. W.			
W. S.			
M. R.			

It is therefore ordered and adjudged by the court that each of the stockholders, defendants named in the above schedule, pay, on or before the — day of —, 18—, into the hands of V. L., the receiver heretofore appointed herein, and now for the purpose of receiving and distributing the money to be paid in pursuance of this order, or into the hands of the clerk of this court (to be by him distributed to the creditors, etc.), the sums above specified, set opposite his name in the judgment column of the schedule, together with interest from the — day of —, 18—, and in default thereof that execution issue therefor.

It is further ordered by the court that out of the money so to be collected the receiver pay first the costs of this case, taxed at \$—, including the fee to the attorneys and master commissioner in full, and that he pay them the money received by him to the several parties named below, according

to the sum set opposite their names respectively, and to which they are herein found entitled, to wit: [*schedule of debts.*]

—
No. 1260.

Order assessing the Statutory Liability of Stockholders.

[*Caption.*]

This day this cause came on to be heard upon the question of the statutory liability of the stockholders of the defendant, the C. W. Co., for an amount equal to an amount of stock held by each stockholder, and the court having heard the evidence and being fully advised in the premises, do find that it is necessary for each of said stockholders of said defendant, the C. W. Co., to pay amounts equal to amount of stock held by each respectively, in order to pay the creditors of the said the C. W. Co., and that said amount when so paid by said stockholders will not be sufficient to pay in full all of the creditors of the C. W. Co.

It is therefore ordered, adjudged, and decreed by the court that the following named stockholders, whom the court here finds to have been duly served with summons, or to have entered their appearance in this case, pay to P. H. B., the receiver herein, within thirty (30) days from this date, to wit, the — day of —, 18—, an amount equal to the original stock held by them respectively, being the statutory liability (not including the stock created by stock dividends as to which all questions are reserved for the further consideration and order of the court), with interest on said amounts from the — day of —, 18—, and in default of such payments that execution issue therefor as upon said judgments at law, namely:

<i>Name.</i>	<i>Original Stock.</i>	<i>Statutory Liability.</i>
G. B.	\$ —	\$ —
G. D.	\$ —	\$ —

And it is further ordered by the court that said receiver credit such of said stockholders as have paid — percent, or any portion of their stock liability to him under a former order of this court as of the date or dates at which such payments were made. And it appearing to the court that O. S., J. A. S., stockholders of the defendant, the C. W. Co., have not been served with process, it is ordered by the court that summons issue to the said parties and service be personally made in pursuance of the statute in such case made and provided.

SURETIES—RIGHTS AND REMEDIES OF.

(*R. S. Secs. 5419, 5832 et seq.*)

No. 1261.**Entry Judgment on Cross Complaint of Surety.**

[*Caption.*]

And the court having heard the evidence, and being fully advised in the premises, finds for the plaintiff; that the allegations of the complaint are true, and that there is due from the defendants to the plaintiff the sum of — dollars.

The court further finds that C. D. is the principal, that the defendant E. F. executed the note sued on as the surety of the defendant C. D., and that the property of said C. D. should be first levied upon and exhausted before levying on the property of the said E. F.

It is therefore considered and adjudged by the court that the plaintiff recover of and from the defendants the sum of — dollars, together with his costs and charges in this cause laid out and expended, taxed at — dollars.

It is further considered and adjudged by the court that execution be first levied upon the property of the said C. D., and that his property subject to execution be first exhausted before levying upon the property of the said E. F. (and that there shall be no stay of execution unless the bail for the stay of execution will undertake specially to pay the judgment in case the amount thereof can not be levied of the said C. D.).

R. S. Sec. 5419. *Gatch v. Simpkins*, 25 O. S. 89.

No. 1262.**Entry of Judgment relieving Surety after Notice by him to Prosecute, and Failure so to do by Creditor.**

[*Caption.*]

[*Continuing after usual judgment.*] And it appearing to the court that the defendant A. C. is a surety upon the obli-

gation herein for the defendant T. S., and that said defendant A. C. did, on the — day of —, serve notice in writing upon the plaintiff herein to commence an action against the said defendant T. S., who is the principal aforesaid, and it further appearing that said plaintiff failed and neglected to comply with the request of said defendant A. C. to so commence said action against said defendant T. E. and to prosecute the same with due diligence, the court finds therefore that the said plaintiff has forfeited his right by reason of his said neglect to demand and receive from the said A. C., as such surety, the amount due upon said obligation, by reason whereof the said defendant A. C. is wholly released therefrom.

It is therefore ordered that the said A. C. be and he is hereby released from said obligation and discharged as a party defendant in this case.

R. S. Sec. 5833.

TAXES AND ASSESSMENTS.

See ASSESSMENTS, INJUNCTION.

VACATION, MODIFICATION OR OPENING OF ORDERS AND JUDGMENTS— RELIEF AFTER JUDGMENT.

(*R. S. Secs. 5354—5365.*)

No. 1263.

**Setting Judgment aside for Fraud—Restraining Plaintiff therein
from Collecting Same.**

[*Caption.*]

This day this cause came on for hearing upon the petition and amended petition of the plaintiff, answer of the defendant, exhibits, and testimony, and was argued by counsel. On consideration whereof the court, after hearing all the proofs and allegations of the parties, and being fully advised in the premises, find that the equity of the case is with the plaintiff;

that all the allegations of plaintiff's petition and amended petition are true, and that the allegations of the defendant's answer contrary thereto are untrue, and that the plaintiff is entitled in equity to the relief prayed for in her said petition and amended petition, and that the injunction heretofore allowed in this action ought to be made perpetual; and the court also finds that the judgment of the court of common pleas of this county, in the case of H. T. against I. S., in error, and being case No. —, and in said petition described, was obtained against the said H. T. by fraud of the said defendant I. S., and that the same is fraudulent and should in equity be wholly set aside and held for naught. It is therefore by the court ordered, adjudged, and decreed that the said judgment of No. — be and the same is hereby wholly annulled, set aside, and held for naught, and that said I. S. pay the costs of the same, taxed at \$——, and execution is hereby awarded against said I. S. therefor, and that he be and is hereby perpetually restrained and enjoined from collecting the same from this plaintiff. And it is also by the court ordered, adjudged, and decreed that the said I. S. be and hereby is perpetually restrained and enjoined from collecting the same from this plaintiff, and it is also by the court ordered adjudged, and decreed that the said I. S. be and is hereby perpetually restrained and enjoined from further prosecuting his said action before B. M. G., J. P. of — township, — county, in said petition and amended petition of plaintiff mentioned and described, or from in any manner enforcing or collecting the same, or of attempting so to do, and that the injunction heretofore allowed in this action be and the same is hereby made perpetual.

It is also ordered and adjudged that the plaintiff recover of the defendant her costs herein expended, taxed at \$——, and that the defendant pay his own costs, taxed at \$——, and execution is awarded.

And thereupon the defendant gave notice of his intention to appeal this cause to the circuit court, and the court being of opinion that this is an appealable case do allow the same, and fix the amount of the bond for such appeal at \$——.

NOTE.—The court may modify its own judgment or order after the term when made, for fraud practiced by the successful party. R. S. 5334. See 2 Kinkead's Code Pleading, Sec. 1217.

No. 1264.

Entry setting aside Judgment on Motion—Granting Defendant Permission to Answer.[*Caption.*]

This case came on for hearing upon the motion of said J. B. Y. to set aside and vacate the judgment heretofore rendered in this case, and upon the evidence, and was argued by counsel; and the court being fully advised in the premises finds that said motion should be sustained, and does sustain the same; and the court further finds that said J. B. Y. is entitled to have said judgment set aside and vacated against him; and the court further finds that said defendant, J. B. Y., has a valid defense to set up against the cause of action set forth in the petition herein; and it is therefore ordered that said judgment be and the same hereby is set aside and vacated, as against him, and a new trial is granted, and by consent leave is given said J. B. Y. to file his said answer herein during this term of court.

R. S. Sec. 5354.

No. 1265.

Order setting aside Judgment taken by Confession to let in Defense.[*Caption.*]

This cause now coming on for hearing upon the petition of the plaintiff, J. W., to vacate the judgment heretofore had at former term of this court rendered, and in what is known as case No. — on the records of this court, wherein the said W. H. I., then in full life, was plaintiff, and the said J. W. and others were defendants, the answer of said defendant A. G. I., executor, and the reply of the plaintiff thereto, and the evidence, and the court finds that the judgment rendered in said cause was taken on an alleged promissory note, to which was attached an alleged power and warrant of attorney; that said J. W., defendant in said case, had no notice of the time and place of the application for and the taking of said judgment; that said judgment was taken for a greater sum than was due and owing from the makers of the said alleged note to the said W. H. I. at the time of taking of said judgment; that said judgment was taken and rendered in said case No. — upon the presentation of the said W. H. I. by and through his attorney therein to the court, and

the bringing in in evidence of said alleged note and warrant of attorney in support of the averments and facts stated in the petition in said case; that there is evidence before this court tending to show that said alleged promissory note and warrant of attorney thereto attached was not signed, executed, and delivered by said J. W., and was not his note or obligation, and that the same was as to the said J. W. a forgery, and the court finds that the said J. W. has a valid defense to the merits of said case, and that said judgment therein should be opened up and vacated for the purpose of allowing said J. W. to make said defense.

It is therefore adjudged that the said judgment in the said case No. — be and the same is hereby opened up and vacated, and a new trial of the case is granted to the said J. W. All liens on the real estate of the said J. W. created and obtained heretofore in favor of the said W. H. I., or his representative, by rendition of the said judgment are hereby preserved and suspended until the final trial of and judgment in said case No. — in this court.

And the defendant herein, A. G. I., executor, etc., wishing to take an appeal from the said judgment to the circuit court of said county, and it appearing to the court that he has not given bond as such executor in the probate court of said county, he is required to give bond in this appeal case, and the bond is fixed at \$——.

R. S. Sec. 5354.

No. 1266.

Entry setting Time for Hearing of Motion to open Judgment.

[Caption.]

Now comes the defendant, C. D., and files his application to open the judgment in this cause rendered —, 18—, and also his affidavit showing that he had no actual notice of the pendency of said action in time to appear in court and object to said judgment, which application and affidavit are in the following words, to wit: [*here insert*]; and also files his answer to the complaint in said cause, which answer is in the following words, to wit: [*here insert*]. And thereupon the defendant moves the court to fix the time for hearing said application and the notice to be given the plaintiff.

It is therefore ordered by the court that said application be and the same is hereby set down for a hearing on the — day of —, 18—, at — o'clock — M., and that the defend-

ant notify the plaintiff thereof by personal service of a written notice of the time and place of said hearing — days before the time fixed therefor.

No. 1267.

Entry setting aside Judgment at Instance of subsequent bona fide Purchaser or Mortgagee—Discharging Premises from Lien.

[*Caption.*]

Now come the parties, and the court being advised herein, it is ordered that the judgment (confessed by Y. Z. in favor of A. B., and entered on the — day of —, 18—) be vacated and set aside as to the said M. N. (the moving party), and as to the real estate hereinafter described, and that the execution issued on said judgment and all proceedings had under it be set aside so far as they relate to or affect the said real estate, and that the said real estate is hereby made and declared to be freed and discharged of and from the apparent lien of said judgment, and of and from any and every and all proceedings whatsoever under and by virtue of the same. The premises above referred to are bounded and described as follows: [*description*].

NOTE.—From *Kendall v. Hodgins*, 1 Bosw. 659; S. C. 7, Abb. Pr. 309.

No. 1268.

**Entry Granting or Denying Motion to Open Default—
Short Form.**

[*Caption.*]

Now come the parties, and after having considered the evidence touching the defendant's motion to set aside the judgment and default herein:

It is ordered that the said motion be denied, with — dollars costs [*or*, be granted, and the said judgment (*describing it*) is hereby set aside and the default opened, and the judgment entered thereon and all proceedings founded thereon be vacated as to the defendant C. D. (*naming which, if not all the defendants*), and said defendant let in to defend the action (*or*, to file his proposed answer herein).]

[*If terms are imposed, add*] This order is made upon condition that [*stating it as in the forms below, and add*] Ordered

further that in default of compliance with any of the terms of this order the defendant's motion be denied, with \$—— costs to plaintiff.

No. 1269.

Entry Opening Judgment and allowing Defense to be Made.

[*Caption.*]

This cause coming on for hearing upon the motion of the defendant herein to open up the judgment rendered herein against him on the — day of —, 18—, and it appearing to the court due notice hereof was served on the plaintiff on the — day of —, 18—.

[*Or*, Come the parties, and the motion of the defendant for an order opening the judgment rendered against him in this cause on the — day of —, 18—, coming on for a hearing.]

And it appearing to the court that the only notice given of the pendency of said action was by publication in a newspaper, and that the defendant had no actual notice thereof in time to appear in court and object to said judgment, it is therefore considered and adjudged by the court that the judgment rendered in this action on the — day of —, 18—, be and the same is hereby opened and vacated, and that the defendant be and he hereby is allowed to defend said action.

It is further ordered that the defendant pay the costs occasioned by this application.

R. S. Sec. 5355.

No. 1270.

Entry Amending Judgment.

[*Caption.*]

Ordered and adjudged that the judgment herein (and the findings on which it was entered) be and the same are hereby amended (*nunc pro tunc*) by striking out (etc.), and by inserting (etc.), or be amended in the following respects [*enumerating them; see other forms below*].

That the clerk of this court correct the judgment record (and the docket of the judgment) in this action to conform herewith, and make a note of this order at the bottom of said judgment.

That C. D. pay to A. B., or his attorney, — dollars, costs of this motion.

[*Or may impose costs on moving party, thus :*] This motion is granted on condition of payment by C. D. to A. B. of \$—— costs within —— from the date of this order.

[*To insert a bill of particulars in complaint.*] That the plaintiff be and hereby is required to file the bill of particulars of his claim in this action furnished by him, and the clerk is hereby directed to annex said bill of particulars to and make it part of the complaint in this action.

[*To reduce excessive recovery.*] That the said judgment in this action in favor of the plaintiff and against the defendants for the sum of \$——, entered on the — day of —, 18—, be and the same is hereby directed to be corrected by reducing the amount thereof to the sum of \$——; and the clerk of this court is hereby directed to correct the docket of said judgment accordingly.

[*To insert costs in judgment and perfect judgment nunc pro tunc, notwithstanding lapse of years.*] That the amount of costs and disbursements as herein taxed, to wit, \$——, be inserted in the judgment herein, and that said judgment be perfected and said judgment docketed in said county of —, as of the date of —, 18—, and that the plaintiff have leave to issue execution in this action for the collection of the costs and disbursements entered in said judgment and the amount of alimony granted in said decree, with interest on each installment thereof from the day when the same became due to the time of the issuing of said execution.

No. 1271.

Vacation of Judgment of Dismissal—Reinstating Cause.

[*Caption.*]

This day this cause came on for hearing upon the motion of the plaintiff to set aside the order and judgment of dismissal heretofore entered by the court herein, and the court being fully advised in the premises does hereby order that the said order of dismissal heretofore entered herein, to wit, on the — day of —, 18—, be and the same is hereby set aside and held for naught; and it is also further ordered that said above-entitled cause be and the same is hereby reinstated upon the dockets of this court.

No. 1272.**Judgment of Dismissal set aside, and Cause Reinstated by
Consent.**

[*Caption.*]

This day this cause came on to be heard on the motion of the plaintiff to set aside the judgment entered herein on the — day of —, 18—, dismissing this case at the plaintiff's cost, without prejudice to a new action, was argued by counsel and submitted to the court.

On consideration whereof, and with the consent of the defendants, said order and judgment is vacated, set aside, and held for naught.

No. 1273.**Order to Loan Money Rescinded.**

[*Caption.*]

This day this cause came on for hearing on the motion of the plaintiffs and all the other judgment creditors of the defendants interested in the funds realized on the orders of sale issued in this case joining in said motion to vacate, set aside, and hold for naught the order of the court heretofore made in this cause, on the first day of —, 18—, authorizing and directing the clerk of this court to loan said funds upon conditions therein named, was argued by counsel, and the court upon consideration thereof doth grant said motion.

It is therefore ordered by the court that said order authorizing and directing the clerk of this court to loan the said funds now in his hands be and the same hereby is rescinded, vacated, and held for naught.

No. 1274.**Entry Correcting Order and Judgment.**

[*Caption.*]

It being shown to the court that the entry of the judgment herein rendered on the — day of —, 18—, as the same was entered upon the journal, is imperfect and does not fully express the order of the court, it is hereby ordered that said entry of said judgment be and the same is hereby set aside. The said finding and judgment of the court were and

are as follows: [*give entry as corrected*]. It is ordered that this order and judgment be entered as of the — day of —, 18—, and that it shall stand as the order and judgment of the court of that date.

WILLS.

Nature of Issue to be Made by the Journal Entry in the Contest of Will, as Reflecting Upon the Entry to be Drawn.—The statute has prescribed what the issue shall be in a contest of a will, and its provisions must, therefore, be followed, and the issue to be so made up must be in exact accord with that prescribed by the statute (*Green v. Green*, 5 Ohio 279).

An answer in proceedings to contest the validity of a will is, in reality, unnecessary to form the issues to be tried, nor to answer, change, vary, limit, or confine the issues, which the statute requires (*Dew v. Reid*, 52 O. S. 523).

The provision of the statute prescribing the issue in such cases, and requiring that it be made up and tried in conformity with the statute, is imperative in its terms, and was deliberately made so, with a view to prevent a disposition of cases for the contest of wills upon the mere consent or acquiescence of parties, in any form (*Walker v. Walker*, 14 Ohio St. 157; *Dew v. Reid*, 52 Ohio St. 524).

The character of evidence which may be introduced in such cases is not to be confined to any pleadings which may be filed (*Haynes v. Haynes*, 33 Ohio St. 598), the rule being that so far as this form of action is, by reason of its being governed by special statutory regulations, inconsistent with the rules of pleading and procedure under the code, the latter are inapplicable (*Dew v. Reid*, 52 Ohio St. 526).

And while the issue may be made up, either by the pleadings, or by an order entered upon the journal of the court, it must be the broad issue required by the statute, whether the instrument produced is the valid will of the testator (*Whittaker's Code*, Sec. 7, 5861); and the proof may be commensurate with the issue, any evidence tending to prove the validity or invalidity, for any reasons whatever, being admissible. The scope of the inquiry on the contest may be as broad as that for the admission of the will to probate (*Dew v. Reid*, 52 Ohio St. 526).

The importance of the journal entry to be drawn in such cases is thus made apparent.

No. 1276.

Ordering Jury Impaneled to try Validity of Will.

[*Caption.*]

It is this day ordered by the court that a jury be impaneled according to law to try the issues in the above-entitled action brought to contest the validity of the instrument purporting to be the last will and testament of U. R., deceased.

It is also further ordered by the court that an issue be and the same is hereby made according to law, whether the writing

produced in the above action is the last will (*or*, codicil) of the testator, the said U. R., deceased, or not.

Code, Sec. 5861; Kinhead's Code Pleading, Sec. 1207.

[Or a shorter form, as given in Dew v. Reid.]

Hattie E. Dew and others	}	Civil Action.
8139 vs.		
Thomas Reid and others.		

Ordered by the court that a jury be impaneled to try the issues whether the paper writing produced, purporting to be the last will and testament of U. R., deceased, is or is not the valid last will and testament of the said deceased.

No. 1277.

Entry upon Rendition of Verdict in Contest of Will.

Hattie E. Dew and others,	}	Verdict.
vs.		
Thomas Reid and others.		

The jury impaneled and sworn in this action on the issues joined between the parties do find that the paper writing here shown to us and admitted to probate in the probate court of — county, state of Ohio, on the — day of —, 18—, purporting to be the last will and testament of U. R., deceased, is the valid last will and testament of said U. R., deceased, (signed) W. H. W., E. H. C., H. S., J. M., W. C. S., A. C., A. B. S., S. P. M., H. J. H., L. C., J. W., and J. H. C., jury. And thereupon plaintiff by her attorneys gave notice of her intention to move herein to set aside said verdict, and for a new trial. Entry of — —, 18—.

Code Secs. 5858 to 5866.

No. 1278.

Entry Overruling Motion for New Trial and Judgment upon Verdict establishing Will in Action to Contest.

[*Caption.*]

And now again came said parties by their attorneys, and the jury impaneled and sworn in this action having on a former day of this term rendered a verdict for the defendants, finding that said paper writing purporting to be the last will and testament of U. R., and admitted to probate in the said probate court of this county on the — day of —, 18—, is

the valid last will and testament of said U. R., deceased. And the plaintiff having filed her motion to set aside said verdict, and for a new trial, and the same coming on now to be heard after argument of counsel, the court on consideration overrules said motion. And therefore, in accordance with said verdict, it is adjudged by the court that said paper writing produced in this case and offered in evidence, purporting to be the last will and testament of said U. R., deceased, is his valid last will and testament. To which ruling and judgment, and particularly the said order and judgment overruling said motion to set aside said verdict, and for a new trial, said plaintiff excepts, and on motion of plaintiff leave is granted for fifty days after the entry of this judgment to file her bill of exceptions herein, and the clerk is ordered to keep the journal of this court open for said time for the purpose of allowing the order and entry of filing said bill of exceptions to be entered thereon.

Ex. Dew v. Reid, 52 O. S. 520. Code Secs. 5858 to 5866.

No. 1279.

Entry Construing Will.

[Caption.]

This day this cause came on to be heard upon the pleadings and the evidence, in so far as they relate to the construction to be placed upon said will, and was argued by counsel; on consideration whereof the court, finding that all of the defendants have been duly served with notice and are before the court, at the request of counsel for W. A. P. and M. A. P., finds the facts to be as follows:

That said will was executed by said testator on the — day of —, A. D. 18—; that said testator died on the — day of —, A. D. 18—, his wife having died prior thereto on, to wit, — day of —, 18—; that I. P., one of the devisees under said will, was living at the time of the execution of said will, and died in —, 18—; that the said I. P., at the time of the execution of said will, had living four children, to wit, [names]; that the said E. W. died intestate on the — day of —, and the said N. E. C. died intestate on the — day of —, and that both of them died before the death of I. and said testator, etc.

And the court upon said facts, including the 8th item of said will, finds the law to be as follows: [*state finding.*]

To which finding of law and this application thereof to the said finding of facts the said W. A. P. excepts.
It is therefore ordered, adjudged, and decreed:

No. 1280.

Entry Construing Will and Quieting Title.

[*Caption.*]

On motion of counsel for plaintiff this cause is placed upon the trial docket of the present term of this court.

Thereupon this cause came on to be heard upon the petition and answer of J. J. S., guardian *ad litem* for infant defendants G. L. A. and E. M. A., heretofore by the court for that purpose appointed, the said defendant N. K. being in default for answer, demurrer, or other pleading, thereupon came the plaintiff and said J. J. S., guardian *ad litem*, and this day was heard and submitted to the court upon the pleadings, exhibits, and testimony adduced, and argument of counsel. Upon consideration whereof, and the court being fully advised in the premises finds that all the defendants have been duly served with summons, or have voluntarily entered their appearance herein, and that each and all the parties are properly before the court, and that the allegations, matters, and things in said petition set forth are each and all true as therein averred, and that the plaintiff is entitled to the relief as prayed for in her petition, and the court finds further that the correct and lawful construction of said will of said L. A., deceased, is, —; and the court finds that there was devised to the plaintiff J. E. K. (formerly J. E. A., and named E. A. in said will) the real estate in the petition described, in fee simple absolute, and that no claim, demand, right, title, interest, or estate was thereby devised to any or either of the defendants; that at the time of the bringing of this action the said plaintiff was and is now in possession of said real estate; that she had and has the legal estate in fee simple absolute thereto; that neither of the defendants, nor any one of them, has any claim, demand, right, title, interest, or estate in or entitled to the possession of the same, or any part thereof, and that the plaintiff ought to have her title quieted as against each and every one of the defendants as prayed for in the petition.

It is therefore ordered, adjudged, and decreed that the title and possession of the said J. E. K. to all and singular the premises in the petition described be and the same is

hereby quieted as against the defendants, each and every one, and all persons claiming under them, or either of them.

And the court finds and adjudges further that the said M. K. has no other interest in said premises except a contingent right of dower therein as the husband of the plaintiff.

2 Kinkead's Code Pleading, Sec. 1213. R. S. Sec. 6202.

ERROR—PROCEEDINGS IN.

NOTE.—Attorneys are not concerned with the entries in the Supreme Court as they are mostly drawn by the clerk, except in special cases, where the judge delivering the opinion, or some one of the judges specially assigned, draws the same. There is, of course, a similarity in the entries in the Supreme and Circuit Courts, and in the latter counsel must draft the entries.

No. 1281.

Entry Granting Leave to File Petition in Error.

[*Caption.*]

This day this matter came on to be heard upon the application of C. L. W. for leave to file a petition in error herein, and leave being granted for that purpose by the court, said petition was forthwith filed, and thereupon upon his application it is ordered that the judgment and sentence of justice court be suspended pending the final determination of this proceeding in error, upon the plaintiff in error giving a bond conditioned according to law, with sureties to the satisfaction of the clerk of this court, and in the penal sum of \$——.

No. 1282.

Entry in Supreme Court staying Execution of Judgment in Circuit Court until Cause Disposed of.

[*Caption.*]

Upon the motion of plaintiffs in error herein it is ordered that execution of the judgment of the circuit court of ——— county, Ohio, for the reversal of which the petition in error in this case was filed, be stayed until the final hearing of the cause in this court upon plaintiffs in error giving bond to the said defendants in error, [*naming them*], said bond to be ex-

ecuted on the part of the plaintiffs in error with sufficient sureties in the sum of \$——, to the satisfaction and approval of the clerk of courts of —— county, Ohio, conditioned and to the effect that the plaintiffs in error will prosecute their petition in error to effect, and will abide and perform the judgment of this court, and pay all damages, penalties, and costs that may be awarded against them, and that they will pay to the said [*name all defendants in error*] interest on so much of said fund as shall finally be awarded respectively to the said defendants at 6 percent per annum from the date of the said judgment of the circuit court.

No. 1283.

Entry upon Motion for Supersedeas in Supreme Court.

[*Caption.*]

On application of the plaintiff in error, and for good cause shown, a temporary restraining order as prayed for in the petition below is allowed pending the determination of this action in this court, and the bond is fixed at the sum of \$——, to be given with sureties to the acceptance of the clerk of this court; and on application of the defendant in error, and it appearing that in this cause the constitutionality of a statute is involved and the state is virtually a party, the cause is advanced on the docket and assigned for oral argument on ——.

No. 1284.

**Entry requiring New Bond for Stay of Execution within
—— days.**

[*Caption.*]

In this cause the court upon application of C. S., administrator of the estate of ——, deceased, holds that the bond herein given for the stay of execution is insufficient.

It is therefore ordered by the court that the clerk of this court shall issue execution upon demand of said C. S., as administrator of said estate, unless a new bond be given herein by said A. C. D., with sufficient surety and in due form of law, in — days from the entry of this decree.

No. 1285.**Entry of Judgment Affirming the Judgment of a Justice of the Peace.**

[*Caption.*]

This cause came on for hearing upon the petition in error, the transcript, the bill of exceptions and the original papers and pleadings from F. B. C., a justice of the peace in and for — township, — county, Ohio, and was argued by counsel, and on due consideration whereof the court finds that there is no error apparent on the record of said proceedings and judgment.

It is therefore considered by the court that the judgment aforesaid be and the same is hereby affirmed, and the defendant in error recover from the plaintiff in error his costs herein expended.

No. 1286.**Entry of Revivor of Proceeding in Error.**

[*Caption.*]

And now come M. R. and M., attorneys, and suggest to the court that the said M. B., defendant in error, has died since the filing of the petition in error herein, and that A. B. has been duly appointed and qualified as administrator of the estate of said M. B., deceased.

And the court being fully satisfied thereof, and all parties consenting, it is hereby, on motion of said A. B., administrator as aforesaid, ordered that this action stand revived in the name of said A. B., administrator of the estate of M. B., deceased, and proceed against him.

No. 1287.**Circuit Court Entry overruling Motion and Demurrer.**

[*Caption.*]

This day this cause came on to be heard upon the motion of the defendants in error to strike from the petition in error the third, fourth, and fifth assignments of error. Upon consideration thereof the court finds said motion not well taken and overrules the same. And thereupon said cause came on further to be heard upon the demurrer of the defendants in error to said petition in error, and the court being fully advised finds that said demurrer is not well taken and overrules

the same. And thereupon said cause came on further to be heard upon the motion of the defendant in error to strike the bill of exceptions from the files for the reason set forth in said motion. And upon consideration thereof the court finds said motion not well taken and overrules the same.

No. 1288.

Entry Affirming Proceedings in Police Court.

[*Caption.*]

This cause came on for hearing upon the petition in error, transcript, and the original papers and pleadings from the police court in and for the city of —, Ohio, and was argued by counsel, and upon consideration whereof the court finds that there is no error apparent on the record in said proceedings and judgment of said police court of said city.

It is therefore considered by the court that the said petition in error be dismissed, the judgment aforesaid be and the same is hereby affirmed; that the said defendant in error recover from the plaintiff in error his costs herein expended, to be taxed.

It is further ordered that a special mandate be sent to the police court in and for the city of —, Ohio, to carry this judgment into execution.

No. 1289.

Reversal of Judgment and Proceedings before Mayor of Village.

[*Caption.*]

This day this cause came on to be heard upon the petition in error, bill of exceptions, transcript from the docket of the mayor of the village of —, of — county, Ohio, and the original papers herewith filed and made a part of the petition herein, and the same being argued by counsel was submitted to the court. And the court being fully advised in the premises doth find that there are numerous errors in the record and proceedings of said mayor complained of in the petition in error herein, the court finding that the ordinance of said village of —, under which the prosecution complained of before said mayor is illegal, and void for the following reasons, to wit:

1. The said ordinance is inoperative and of no effect, no date being designated when it should take effect.

2. That the subject-matter of said ordinance is not clearly set forth in the title thereof.

3. That said ordinance was not published as required by law, and that said proceedings had before said mayor under said ordinance were illegal and void.

It is therefore here ordered and adjudged that the judgment and proceedings of said mayor herein be and the same are hereby reversed, vacated, and set aside; that the plaintiff in error recover from the defendant in error his costs herein expended, taxed at \$——, and that he be discharged from the prosecution in the petition in error complained of.

No. 1290.

Entry Affirming Lower Court—Circuit Court.

[*Caption.*]

This cause came on to be heard upon the petition in error of the said ——, plaintiff in error herein, and each assignment of error therein, together with the original papers and pleadings and a duly certified transcript of the orders and judgment of the court of common pleas of —— county, Ohio, filed therewith in the said cause, wherein L. D. was plaintiff and the —— Street R. R. Co. is defendant, mentioned and referred to in said petition in error, and was argued by counsel. Upon consideration whereof the court find that there is no error manifest upon the face of the record in said orders and judgment of said court of common pleas.

It is thereupon considered, ordered, and adjudged by this court that the judgment and proceedings of the said court of common pleas in said cause in favor of the said defendant in error and against the said plaintiff in error be and the same are hereby in all things affirmed; there being, however, in the opinion of the court, reasonable ground for this proceeding in error, no penalty is allowed. (*Or, if penalty.* And there being, in the opinion of the court, no reasonable grounds for this proceeding in error, it is therefore considered and ordered that the plaintiff in error pay the costs herein, and to the defendant in error the sum of —— dollars as a penalty.)

It is further considered and ordered that the plaintiff in error pay the costs of this proceeding in error, taxed at \$——, and in default thereof that execution issued therefor.

To which judgment and order of the court in so affirming said judgment said plaintiff now and here duly excepts.

Ordered that a special mandate be sent to the court of common pleas of — county to carry this judgment into execution.

No. 1291.

Entry in Circuit Court Modifying Judgment by Remittitur of Portion of Verdict and Affirming Lower Court.

[*Caption.*]

This cause coming on for hearing upon the petition in error, the transcript and the original papers and pleadings from the court of common pleas of — county, was argued by counsel and submitted to the court; on consideration whereof the court find that there is error in the record in said proceedings and judgment in this, to wit:

That the assessment of damages and judgment are excessive in the amount of — (\$—) dollars, the amount of the physician's bill, and that said judgment should therefore be reversed, unless the defendant in error will remit said excess of — (\$—) dollars, but that if said excess is remitted then said judgment should be affirmed to the amount of — dollars.

The defendant in error having appeared in open court and consented to said remittitur, it is therefore considered by the court that the judgment aforesaid be and the same is hereby affirmed to the amount of \$—, and that the defendant in error recover from the plaintiff in error her costs herein expended, taxed at \$—, to all of which the plaintiff in error excepts.

It is further ordered that a special mandate be sent to the common pleas court of — county, Ohio, for the execution upon said judgment as herein modified, to which the plaintiff in error excepts.

From Mt. Adams & E. P. I. Ry. v. Wysong, Hamilton County.

No. 1292.

Error—Entry of Reversal pointing out Specific Error.

[*Caption.*]

This cause coming on to be heard upon the petition in error, together with the original papers and pleadings, and a duly certified transcript of the orders and judgment of the court of common pleas of — county, Ohio, filed herewith in the said action, wherein the said M. D. was plaintiff, and

the said — was defendant, mentioned and referred to in said petition in error, and was argued by counsel. Upon consideration thereof the court finds in the record and proceedings aforesaid that there is manifest error upon the face of said record to the prejudice of the plaintiff in error in this case, to wit: (specify errors as, that the general verdict of said jury rendered in said action was contrary to the manifest weight of the evidence, and not sustained by sufficient evidence.)

It is therefore considered, ordered and adjudged by this court that the judgment and proceedings of the said court of common pleas in said action in favor of the said defendants in error and against the said plaintiff in error be and the same are hereby set aside, reversed, and held for naught, and that the said plaintiff in error be restored to all things which he has lost by reason of said judgment. That the said action be and it is hereby remanded to said court of common pleas of — county, Ohio, to be proceeded in according to law and the rights of the party. That the said defendant in error pay the costs of this proceeding in error to be taxed, and that a special mandate be sent to the court of common pleas to carry this judgment and order into execution.

No. 1293.

Entry in Supreme Court of Reversal, rendering Judgment which Lower Court should have rendered.

[*Caption.*]

This cause came on to be heard upon the transcript of the record of the circuit court of — county, Ohio, and was argued by counsel. On consideration whereof it is ordered and adjudged by this court that the judgment of the circuit court be and the same is hereby reversed at the cost of the defendants in error for the reason that the lot of the plaintiff in error should not be assessed for the improvements on — avenue for the full length thereof, but should be assessed only thereon for the number of feet it fronts on — avenue, that being the proper frontage of the property as shown by the finding of facts. And thereupon this court proceeding to render judgment which the circuit court of said — county should have rendered, it is ordered and adjudged that the assessments made on the property of the plaintiff for the improvement made on — avenue be reduced to an assessment for the number of feet at the rate fixed by the ordinance, equal to the breadth of the property, or its frontage on —

avenue, and that the collection of the assessment made on the property for the improvement on ——— avenue in excess of the amounts so ascertained be and the same is hereby enjoined. And it is further considered and ordered that the plaintiffs in error recover of the defendants in error their costs in this court, in the circuit court, and in the court of common pleas expended, to be taxed. Ordered that a special mandate be sent to the circuit court of ——— county to carry this judgment into execution.

No. 1294.

Entry in Supreme Court on exceptions to Court of Common Pleas in Criminal Case.

[*Caption.*]

This cause came on to be heard upon the transcript of the record of the court of common pleas of ——— county, and was argued by counsel. On consideration whereof it is ordered and adjudged by this court that the said exceptions of the prosecuting attorney to the ruling of the court of common pleas be and the same are hereby sustained. It is ordered that a fee of \$—— be allowed the attorney representing the judge of the court of common pleas, to be paid out of the treasury of county. Ordered that a special mandate be sent to the court of common pleas of ——— county to carry this judgment into execution.

JUDGMENT ENTRIES IN
CRIMINAL CASES.

PROCEEDINGS TO PREVENT CRIME.

(*R. S. Secs. 7106—7128.*)

No. 1295.**Entry of Discharge on Failure to Prosecute Complaint.**

[*Caption.*]

The defendant herein, having appeared in compliance with the conditions of his recognizance, entered into before —, justice of peace [*or*, judge of the police court], which said recognizance has been filed in this court, and it appearing that the complainant has failed to prosecute said complaint, and no good cause being shown to the contrary, it is ordered that the said defendant be and he is hereby discharged from his said recognizance.

R. S. Sec. 7112.

No. 1296.**Hearing of Peace Warrant Charge in Common Pleas Court.**

[*Caption.*]

This day came the prosecuting attorney on behalf of the state of Ohio, and the complainant, A. B., and the defendant in person, and thereupon this cause came on to be heard upon the complaint preferred by said A. B. against the defendant to keep the peace, the said complaint and recognizance of said defendant having been certified to this court by —, justice of the peace of —. And the court having heard all the evidence adduced by the parties, orders that the said — enter into a recognizance in the sum of \$—, to keep the peace with the complainant, A. B., as well as all other persons, for the period of one year from this date, and upon his failure to enter into such recognizance that he be committed to the jail of said county until he shall comply with this order or be otherwise discharged, and that he pay the costs of these proceedings.

R. S. Sec. 7113-14.

ARREST, EXAMINATION, BAIL, ETC.

(*R. S. Secs. 7129—7188.*)

No. 1297.**Entry of taking of Recognizance before Indictment.**

[*Caption.*]

This day came the defendant, with — and —, his sureties, and entered into recognizance before the court in the sum of \$—, conditioned for his appearance on the first day of the next term to answer said charge herein, filed against him for —.

R. S. Sec. 7164.

No. 1298.**Entry of Discharge of accused by Examining Court.**

[*Caption.*]

This day came the defendant herein, charged with the crime of —, and also came the clerk of courts and prosecuting attorney of said county, and attended herein as an examining court as provided by law, and it appearing that at least three days' notice has been given of the time of holding said examining court, and the court having examined the witnesses, including the person accused, and finding that there is no probable cause for holding said defendant to answer said charge, —, therefore orders that said defendant be discharged from further imprisonment.

(*Or, and it appearing to the court that there is probable cause for holding said defendant, it is ordered that he enter into a recognizance to answer said charge at the first day of the next term of said court of common pleas, and that in default of the giving of such recognizance that he shall be recommitted to the custody of the sheriff.*)

R. S. Sec. 7165.

No. 1299.

Entry of Order fixing Recognizance by Examining Court.

[Caption.]

It appearing to the court that the defendant herein has failed to enter into a recognizance as heretofore ordered by said examining court for his release and discharge from the custody of the sheriff, it is therefore ordered that the amount of recognizance for his discharge at any time hereafter be fixed at the sum of \$——, with sureties to the approval of any judge discharging him, and it is ordered that this entry be entered upon the journal by the clerk of the common pleas court.

R. S. Sec. 7168.

No. 1300.

Entry of Recognizance taken after Indictment found.

[Caption.]

This day came the defendant, with —— and ——, his sureties, and entered into a recognizance before the court in the sum of \$——, conditioned for the appearance of said defendant before the court from day to day and term to term, to answer a certain indictment filed against him for [*state offense*].

NOTE.—This is a compliance with Section 7174, which provides that the court may at its discretion make an entry on the journal, fixing the amount in which the party indicted may be recognized for his appearance, and no previous entry determining the amount is necessary.

It is an advisable practice to take the recognizance from day to day and from term to term in order to avoid the necessity of taking a new recognizance at the close of the term, and thus requiring persons whose trials have not been had during the term to again appear and enter into a new recognizance.

No. 1301.

Entry fixing Amount of Recognizance in Felony.

[Caption.]

It appearing that the defendant has been indicted for the crime of [*state it*], and that he has not been arrested or recognized to appear before the court, the sheriff is hereby authorized to take his recognizance for his appearance according to law in the sum of \$——.

R. S. Sec. 7174.

No. 1302.**Return of Recognizance and Record of same.**

[*Caption.*]

This day came the sheriff and returned the recognizance of the defendant herein, according to an order of the court, which recognizance is as follows: [*copy.*]

R. S. Sec. 7176. *

No. 1303.**Surrender of Defendant by his Surety.**

[*Caption.*]

This day came —, surety on the recognizance of the defendant herein, and delivered said defendant in open court, and at the request of said — he is discharged from further responsibility on said recognizance, and it is ordered that in default of the giving of a new recognizance the defendant be remanded to the custody of the sheriff.

R. S. Sec. 7177. The same entry substantially can be used under Sec. 7178.

No. 1304.**Entry Forfeiting Recognizance.**

[*Caption.*]

This day came the prosecuting attorney of said county on behalf of the state of Ohio, and it appearing to the court that the said defendant entered into a recognizance in the sum of \$— before (the clerk of this court), on the — day of —, 18—, (*or*, before J. S., justice of the peace of — township, — county, Ohio), and thereupon the said defendant having been three times called to appear and answer said charge in accordance with the terms and conditions of his said recognizance, and said defendant having failed to appear, and still failing so to do, the said L. M., surety upon said recognizance was thereupon three times called to produce the body of the said defendant in court as provided in said recognizance, which he failed to do, it is therefore ordered by the court that the said recognizance be and the same is hereby forfeited absolutely.

THE GRAND JURY.

(*R. S. Secs. 7189—7211.*)

No. 1305.

Entry Ordering Venire for Grand Jury.

It is ordered by the court that the clerk thereof draw from the jury wheel according to law the names of twenty qualified electors of — county, and state of Ohio, to serve as grand jurors for the — term of —, the court of common pleas of — county, and the state of Ohio, and the same was accordingly so done by —, clerk of the court of common pleas of — county, and state of Ohio, and —, sheriff of — county, and state of Ohio, and in the presence of Honorable —, one of the judges of the court of common pleas of — county, and state of Ohio. The following names were drawn, to wit: [*insert names*]. The venire facias was issued to the sheriff of — county, and state of Ohio, commanding him to summon the aforesaid twenty persons so drawn to appear on the — day of —, 18—, to serve as grand jurors aforesaid, and of this writ to make due return on the — day of —, 18—.

No. 1306.

Entry upon return of Venire Facias for Grand Jury and Impaneling Same.

The venire facias for a grand jury, heretofore issued to the sheriff of — county, Ohio, returnable this day, was duly returned by said sheriff with his endorsement thereon. And upon calling same in open court in answer thereto accepted [*names*], and for good cause shown the court excused the following persons, to wit: [*names excused*], and ordered the clerk to draw from the wheel according to law the names of — persons, additional jurors, to fill up the panel, and to issue a venire facias to the sheriff of said county commanding them

to appear on — day of —, 18—, and the same was accordingly so done by —, clerk of the court of common pleas of — county, state of Ohio, and sheriff of — county, state of Ohio, and in the presence of Honorable —, one of the judges of the court of common pleas within and for said county, and the following names were drawn, to wit: [*names of additional jurors drawn*].

And thereupon the court took a recess until — o'clock P. M. on the same day. And afterwards, to wit: on the same day at the hour of — o'clock P. M., upon a recall of the first venire all of the jurors heretofore present and not excused appeared in answer thereto, and upon the calling of the alias venire the following persons, to wit: [*names*] appeared; J. R. S. being absent, T. C. out of the county, and J. S. sick, and for good cause shown the court excused [*names*], and the panel being complete the court appointed T. R. foreman, and each with his fellow juror took the oath in manner and form prescribed by law, and the grand jurors after being instructed by the court in relation to their duties were conducted to their room by —, deputy sheriff. The following persons compose the grand jury for the — term, —, 18—, the names thereof having been drawn from the wheel according to law, to wit: [*names and residences*].

No. 1307.

Form of Special Oath administered to Foreman of Grand Jury.

You solemnly swear in the presence of Almighty God that, saving yourself and fellow jurors, you, as foreman of this grand inquest, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge or otherwise come to your knowledge touching the present service. The counsel of the state, your own, and your fellows you shall keep secret, unless called upon in a court of justice to make disclosures. You shall present no person through malice, hatred, or ill will, nor shall you leave any person go unpresented through fear, favor, or affection, or for any reward or hope thereof. But in all your presentments you shall present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding.

No. 1308.**Form of Oath administered to the Remainder of Grand Jury.**

The same oath which A. B., your foreman, has taken before you, you and each of you shall well and truly observe and keep on your respective parts, and this you swear in the presence of Almighty God.

R. S. Sec. 7192.

No. 1309.**Form of Oath administered to Grand Jury Witnesses.**

You solemnly swear that the testimony you shall give before the grand inquest now in session within and for the — county, state of Ohio, shall be the truth, the whole truth, and nothing but the truth, as you shall answer to God.

R. S. Sec. 7199.

No. 1310.**Entry showing administration of Oath to Grand Jury Witnesses.**

This day came [*names*], who were by order of court, at the request of the prosecuting attorney, duly sworn in open court to testify before the grand jury now in session for this, the county of —, which was ordered by the court to be duly certified, and the same was accordingly so done.

No. 1311.**Entry when one Juror sick and another takes his Place.**

It appearing to the court that L. L., one of the grand jurors heretofore impaneled and sworn herein, is sick and unable to further serve as such grand juror, the said L. L. is excused, and — is sworn to act in his place.

R. S. Sec. 7202.

No. 1312.**Entry of Report of Grand Jurors.**

This day appeared at the bar of this court the grand jury heretofore duly impaneled and sworn in and for the body of

the county of —, and state of Ohio, namely: [*names of the jurors*], and presented to the court through their foreman, F. R., the following indictments, to wit: [*names of indictments*].

And there being no further business to come before the grand jury, the court thereupon discharged the said grand jury without day.

No. 1313.

Entry Ordering Capias to Issue for Persons Indicted not in Custody of Sheriff.

It is ordered by the court that capias issue for the following named persons not in custody, they having been indicted by the grand jury: [*names of persons*].

**INDICTMENT AND PROCEEDINGS
THEREON.**

(*R. S. Secs. 7212—7239.*)

No. 1314.

Election when two Indictments Pending against Defendant.

[*Caption.*]

There being two indictments pending against the defendant at this time for the same criminal act, upon motion of said defendant the prosecuting attorney is required to elect upon which he will proceed. And the prosecuting attorney elected to proceed to trial for the crime of —.

R. S. Sec. 7212.

No. 1315.

Entry where Indictment is Joint—Election made by State to try one of Defendants.

[*Caption.*]

This day came the prosecuting attorney and assistants on behalf of the state of Ohio, and the defendants in their own

proper persons in the custody of the sheriff. Thereupon defendants demanded separate trial, and the state elects to try H. C. first. Thereupon came a jury, to wit: [*names*].

NOTE.—Then follows the usual entry.

PROCEEDINGS BETWEEN INDICTMENT AND TRIAL—ARRAIGNMENT AND PLEA.

(R. S. Secs. 7240—7266.)

No. 1316.

Entry—Insanity of Defendant suggested and Order for Jury to try Question.

[*Caption.*]

This day came the prosecuting attorney and assistants on behalf of the state of Ohio, and the defendant in his own proper person and by counsel. Thereupon P. and H., attorneys for defendant, suggested to the court that the defendant in this case is not sane, and also presented to the court the certificate of H. M. T., M. D., to the same effect. It is ordered that a jury be impaneled to try the question whether or not the said defendant, G. K., is sane, and it is ordered that the said cause be set for hearing on the — day of —, 18—, to which time it is ordered that the venire be made returnable, and the jurors of the regular panel not heretofore excused are discharged until the — day of —. Thereupon the clerk drew from the wheel according to law in the presence of Hon. —, judge of the court, the names of twenty persons to appear on the — day of —, 18—, at — M. o'clock, to serve as such special jurors.

From State v. Kalb, Franklin County Common Pleas. R. S. Sec. 7240.

No. 1317.

Entry of Impaneling Jury to try Question of Insanity.

[*Caption.*]

This day came the prosecuting attorney and assistants on behalf of the state of Ohio, and the defendant in his own

proper person and by counsel. Thereupon the venire heretofore issued to the sheriff and returnable this day was duly returned by the sheriff, and upon calling the same in open court all appeared in answer thereto excepting [names], and for good cause shown the court excused [names], and there being twelve qualified jurors remaining in the box, to wit: [names], who were duly impaneled and sworn to well and truly try the question in this case, to wit: whether the defendant, G. K., is or is not sane, and a true verdict render according to law and the evidence, so help you God. And thereupon the trial of this cause progressed, and the same not being concluded, and the time of adjournment having arrived, the court adjourned the further hearing of this case until —.

From State v. Kalb, Franklin County Common Pleas. R. S. Sec. 7240.

No. 1318.

Entry of return of Verdict finding Defendant Sane.

[Caption.]

This day came the prosecuting attorney and assistants on behalf of the state of Ohio, and the defendant in his own proper person, in custody of the sheriff, and by counsel; also came the jury heretofore duly impaneled and sworn to try the question in this case. Thereupon the trial of this cause progressed, and the jury having heard the evidence, arguments of counsel, and charge of the court, retired to the room to deliberate upon a verdict, and after due deliberation thereon returned again into open court and presented their verdict in writing in the words and figures following, to wit: (We, the jury duly impaneled and sworn to try the question in this case, to wit, whether the defendant, G. K., is sane or is not, find that said defendant, G. K., is sane and was sane at the commencement of the trial of this case, to wit, on the — day of —, 18—.)

(Signed by all the jurors.)

R. S. Sec. 7242.

No. 1319.

Entry of Arraignment—Plea of not Guilty.

[Caption.]

This day came the prosecuting attorney and his assistants on behalf of the state of Ohio, and the defendant in his own

proper person (and by counsel), and the said defendant having been duly served with a copy of the indictment herein as required by law, and not desiring further time to examine the same or to prepare exceptions thereto, was first thereupon duly arraigned in open court and waived the reading of indictment to him, and for plea thereto says he is not guilty, which plea was entered accordingly upon said indictment.

R. S. Sec. 7244.

No. 1320.

Entry of Arraignment and Plea—Appointment of Counsel.

[*Caption.*]

This day came the prosecuting attorney and his assistants on behalf of the state of Ohio, and the defendant in his own proper person, in the custody of the sheriff, and the defendant being without counsel and unable to employ any, the court thereupon appointed — to defend him. And the defendant having been duly served with a copy of the indictment hereof as required by law, and not desiring further time to examine the same or prepare exceptions thereto, was thereupon arraigned in open court and waived the reading of the indictment to him, and for plea thereto says that he is not guilty, which plea was entered accordingly upon said indictment.

R. S. Secs. 7245, 7247.

No. 1321.

Entry of withdrawal of Plea and Entry of Defendant's Plea.

[*Caption.*]

This day came the prosecuting attorney and his assistants on behalf of the state of Ohio, and the defendant, G. J., in his own proper person, in the custody of the sheriff, and by his counsel (F. S.), and thereupon leave was granted said defendant, G. J., to withdraw his former plea, and the same was accordingly so done. Thereupon the defendant was arraigned in open court and the indictment was read to him by L. L., deputy clerk of court, and for plea thereto says that he is guilty as charged therein, which plea was entered accordingly upon said indictment. Thereupon said defendant was inquired of if he had anything to say why judgment should not be pronounced against him, and after hearing his statement and that of counsel, it is therefore adjudged by the

court that the said defendant, G. J., be imprisoned in the penitentiary of this state and kept at hard labor for the period of — years (on the charge of burglary and larceny), no part of said time to be kept in solitary confinement, and that he pay the costs of prosecution, taxed at \$——, for which execution is awarded.

No. 1322.

Entry Allowing Fees to Counsel Appointed.

[*Caption.*]

It is ordered by the court that C. D. S., who was heretofore appointed by the court to defend G. H., charged herein with the crime of ——, be and he is hereby allowed the sum of \$——; and it is further ordered that said amount be certified by this court to the county commissioners and county auditor for allowance and payment, and the same is accordingly done.

R. S. Sec. 7246.

No. 1323.

Entry where Plea in Abatement is sustained and Prisoner Committed.

[*Caption.*]

This day this cause coming on to be heard upon the indictment and plea in abatement interposed by the defendant thereto, and was argued by counsel. And the court being fully advised finds that said plea is well taken and sustains the same. (a) It is therefore further ordered that the defendant be committed to the custody of the sheriff.

R. S. Sec. 7252.

No. 1324.

Same Continued—Prisoner Discharged on his Recognizance.

[*Caption.*]

[*Continuing from (a) in ante No. 1323.*] It is also further ordered that the defendant be allowed to enter into a recognizance in the sum of \$——, conditioned for his appearance at the first day of the next term of this court to answer the charge against him, and that upon his failure to so enter into his said recognizance that he be remanded to the custody of the sheriff.

No. 1325.

Entry of Withdrawal of Plea and the Filing of a Motion to Quash on Plea in Abatement and Judgment thereon.[*Caption.*]

This day came the prosecuting attorney and assistants on behalf of the state of Ohio, and the defendant in his own proper person, in the custody of the sheriff, and by counsel, and asked and was granted leave to withdraw his former plea of not guilty, and the same was accordingly so done. And thereupon the said defendant filed his motion to quash (*or*, plea in abatement), and thereupon said motion (*or*, plea) came on to be heard, and was argued by counsel and was submitted to the court. On consideration thereof, and the court being fully advised, finds that said motion (*or*, plea in abatement) is not well taken, and does therefore overrule the same (*or*, that said motion or plea in abatement is well taken, and does therefore sustain the same).

[*And where the motion is overruled a plea is to be entered as follows :*]

And thereupon the defendant was duly arraigned in open court and waived the reading of the indictment, or the indictment having been read to him, and for plea thereto says that he is not guilty, which plea was entered accordingly upon said indictment.

No. 1326.

Entry upon Plea in Abatement where the Defendant is Charged by an Incorrect Name.[*Caption.*]

This cause coming on to be heard upon the plea in abatement interposed by the defendant to the indictment herein against him, and it appearing that he has not been indicted by his true name, and that his true name is [*state what*], it is ordered by the court that said indictment be and the same is hereby corrected so as to show the true name of the said defendant, and that the said charge be proceeded upon against the said defendant under the indictment as herein corrected.

No. 1327.

Entry of hearing upon Demurrer to Indictment.

[Caption.]

This day this cause came on to be heard upon the demurrer to the indictment heretofore filed herein; the same was argued by counsel and submitted to the court; and the court upon consideration thereof, being fully advised in the premises, finds that said demurrer is not well taken, and overrules the same; to which finding and ruling of the court the defendant excepts, he being present in court in his own proper person, in the custody of the sheriff, at the time the said demurrer was overruled. And thereupon said defendant not being at this time ready to be arraigned upon said indictment to enter his plea thereto, requested further time, which was thereupon granted.

R. S. Sec. 7256.

No. 1328.

Former Plea withdrawn—Rearraigned Plea of Guilty Entered and Sentenced.

[Caption.]

This day came the prosecuting attorney and assistants on behalf of the state of Ohio, and the defendant in his own proper person and by counsel. Thereupon leave was granted said defendant to withdraw his former plea heretofore entered herein, and the same is accordingly done. Thereupon said defendant was rearraigned in open court and waived the reading of the indictment to him, and for plea thereto says that he is guilty as charged therein. Thereupon said defendant was inquired of whether he had anything to say why judgment should not be pronounced against him, and after hearing his statement, it is therefore adjudged by the court that the said defendant, J. R., be imprisoned in the jail of this county for the period of — days, and that he pay a fine of \$—— and the costs of prosecution, taxed at \$——, for which execution is awarded.

No. 1329.

Entry of Withdrawal of former Plea in Felony and Change of Plea upon Charge for Misdemeanor and Sentence.

[Caption.]

This day came the prosecuting attorney on behalf of the state of Ohio, and the defendant in his own proper person and by counsel. Thereupon leave was granted said defendant to withdraw his former plea heretofore entered herein, and the same was accordingly so done, and thereupon defendant was arraigned in open court and waived the reading of the indictment to him, and for plea thereto says that he is guilty of petit larceny as charged in the indictment, which plea was accepted by the state and entered accordingly upon said indictment, and *nolle prosequi* as to the felony is entered herein by order of court at the request of the prosecuting attorney. Whereupon said defendant was inquired of whether he had anything to say why judgment should not be pronounced against him, and after hearing his statement it is therefore ordered that the said defendant, J. C., pay a fine of \$—— and the cost of the prosecution, and that he be imprisoned in the jail of this county for the period of — days.

No. 1330.

Entry Ordering change of Venue.

[Caption.]

(This day this cause came on to be heard upon the separate motion of the defendant, P. J. E., filed on the — day of —, 18—, to dismiss this case as to him upon the grounds stated therein, and was argued by counsel and submitted to the court. And thereupon the prosecuting attorney stated in open court that the state was ready and willing to proceed and try the accused at this term of court, said motion to dismiss was overruled, to which the defendant excepted, and said case was set down for trial on the — day of —, 18—, by order of the court. A panel of thirty-six persons was drawn and summoned to appear on said day, and thereupon the prosecuting attorney having filed his written motion to continue the case to the next term of court for want of time to try the same at this present term of court), the said defendant, P. J. E., filed his written motion in writing, praying the court to

send this case for trial, and direct that he be tried in some adjoining county according to statute in such case made and provided, for the reason and upon the ground stated in said motion, and filed in support thereof affidavits; and thereupon this cause came on to be heard upon said motion and application aforesaid, and it appearing to the court by said affidavits that a fair and impartial trial of this case can not be had in this county, and no counter affidavits being filed by the state, it is ordered and directed that the venire herein be and the same is hereby changed to the adjoining county of —.

From State v. Elliott, Franklin County Common Pleas.

TRIAL, VERDICT AND JUDGMENT.

(*R. S. Secs. 7267—7305.*)

No. 1331.

Entry Special Plea in Bar tried to a Jury.

State vs. W. R.

This day this cause came on to be heard upon the answer of the state of Ohio to the special plea in bar heretofore filed by the defendant, in which the defendant plead a former acquittal of the offense herein charged, and the issue thus being made up as to whether or not the said defendant had heretofore had a judgment of acquittal of said charge, the same was tried to a jury composed of [*names*], who were duly impaneled and sworn to well and truly try and true deliverance make between the state of Ohio and the prisoner at bar, W. R., and all of the testimony on both sides having been offered, and the cause having been duly argued on both sides by counsel, and the charge of the court having been duly and lawfully delivered to the said jury, the said jury retired for consultation, and thereafter reported in court a verdict on behalf of the state of Ohio and against the defendant, which verdict was in the words following, to wit:

We, the jury in this case, find upon the issues joined by the special plea in bar and the answer thereto herein, in favor of the state.

———, Foreman.

No. 1332.

Entry Ordering Commission to take Testimony.

[Caption.]

The defendant herein having made application in writing for a commission to examine —, a witness in his behalf, residing at —, it is by the court ordered that —, Esq., of —, be and he is hereby appointed a special commissioner to take the testimony of the said —, upon the interrogatories which will be annexed thereto, and that — notice be given to the prosecuting attorney of this order.

R. S. Sec. 7293.

No. 1333.

Entry Impaneling Jury—Other than Capital.

[Caption.]

This day came the prosecuting attorney and his assistants on behalf of the state of Ohio, and the defendant in his own proper person, in the custody of the sheriff, and by counsel, and thereupon came a jury, to wit: [*names of jury*], who were duly impaneled and sworn to well and truly try and true deliverance make between the state of Ohio and the prisoner at the bar, J. S., so help you God. And thereupon the trial of this cause progressed. And the said jury having heard the evidence, arguments of counsel, and charge of court, retired to their room to deliberate upon a verdict, and after due deliberation thereon, returned again into open court and through their foreman presented their verdict signed by their foreman, in the words and figures following, to wit: "We, the jury in this case, find the defendant, J. S., guilty of [*offense*] in manner and form as he stands charged in the indictment.

S. S., Foreman."*

Thereupon defendant by counsel gave notice of a motion for a new trial.

No. 1334.

Entry ordering Jury to View Premises or Place.

[Caption.]

Upon motion, and the court being of the opinion that the jury should view the place where [*state*], it is ordered that

the said jury be conducted in a body, under charge of the sheriff, to said place, together with the defendant, which shall be shown to them by —, who is appointed by the court for that purpose.

R. S. Sec. 7283.

No. 1335.

Entry overruling Motion for New Trial and Sentence.

[*Caption.*]

This day came again the prosecuting attorney and his assistants on behalf of the state of Ohio, and the defendant in his own proper person, in the custody of the sheriff, and by his counsel, and thereupon this cause came on further to be heard upon the motion of the defendant for a new trial filed in this case, and the same was argued by counsel and submitted to the court. On consideration whereof and being fully advised in the premises find that said motion is not well taken, and does therefore overrule the same, to which ruling and order of the court the defendant by counsel then and there excepted. Thereupon the court informed the defendant of the finding of the jury and inquired of him if he had anything to say * why judgment should not be pronounced against him, and after hearing his statement and that of counsel it is therefore ordered and adjudged by the court that the defendant, J. S., be imprisoned in the penitentiary of this state for the period of — years, and kept at hard labor, no part of said time in solitary confinement, and that he pay the costs of prosecution, taxed at \$——, for which execution is hereby awarded.

No. 1336.

Entry of Judgment and Sentence upon Verdict where no Motion for New Trial is made.

[*Caption.*]

[*Continuing from * in ante No. 1333.*]

And thereupon said defendant not desiring to file a motion for a new trial, the state thereupon moved the court for sentence. Thereupon the court informed the defendant of the verdict of the jury, and inquired of him if he had anything to say, etc. [*and proceed as in ante No. 1335 from *.*]

No. 1337.

Entry upon Motion to Arrest from Jury and for Judgment
for Defendant.

[Caption.]

This day came the prosecuting attorney and assistants on behalf of the state of Ohio, and the defendant in his own proper person, and in the custody of the sheriff, and by counsel, and also came the jury, to wit: [names], who were duly impaneled and sworn according to law, and thereupon the trial of this cause progressed, and the state having introduced its testimony and rested its case, thereupon the defendant made a motion to arrest the testimony from the jury and have judgment for his discharge for the reason that there is a variance between the evidence and the indictment. And the court being advised finds that there is a variance between the statement in the indictment and the proof offered in support thereof as to a material fact, to wit: [state what variance is], and that by reason thereof the defendant has been prejudiced. It is therefore ordered that the jury be discharged from further consideration of this case, and that the defendant be discharged.

R. S. Sec. 7216. The language of this section is peculiar. Such an entry as this is rare. Variances sufficient to authorize an acquittal do not frequently occur. "A variance is not now regarded as material unless it is such as might mislead the defense, or might expose the accused to the danger of being put twice in jeopardy for the same offense." Abbott's Crim. Brief, p. 411.

No. 1338.

Entry arresting Case from Jury where Mistake made in
Indictment.

[Caption.]

This day came the jury heretofore impaneled and sworn in the above-entitled cause, and the prosecuting attorney and his assistants, and the prisoner in his own proper person, and in the custody of the sheriff, and his attorney, E. B. K., and the state having no further testimony to offer in its behalf thereupon rested its case, and the defendant thereupon moved the court to strike out and withdraw from the consideration of the jury all the testimony heretofore offered in this case relating to the forgery of the endorsement of the signature purporting to be that of R. W. C. upon the back of the check set forth in the indictment herein, which motion the court

sustained. And thereupon the defendant further moved the court to instruct the jury to return a verdict of not guilty under the indictment herein, which motion the court overruled, and to which ruling and order of the court the defendant at the time excepted. And thereupon on a motion of the prosecuting attorney, and it appearing to the court that a mistake has been made in this case in charging the proper offense in the indictment against the defendant, the jury in this case was thereupon discharged by the court without prejudice to the prosecution, to which discharge and to which order and ruling of the court discharging the jury the defendant by his counsel objected and excepted, and the jury were discharged without the consent of the defendant. And it further appearing to the court that there is good cause to detain the said defendant in custody, it is ordered by the court that he be held in bail in the sum of \$—— for his appearance on the first day of next term by this court to answer the charge against him, and that in default thereof that he be committed to jail in the custody of the sheriff, which order and ruling of the court the defendant by his counsel excepts.

R. S. Sec. 7303.

No. 1339.

Entry discharging Jury on Account of Sickness of Juror.

[*Caption.*]

This day came the prosecuting attorney and assistants on behalf of the state of Ohio, and defendant in his own proper person and by counsel, and it appearing to the court that on account of the sickness of one of the jurors in this case, to wit, F. L., and the continued sickness of said F. L., the trial can not proceed. It is therefore ordered by the court that the jury in this case be discharged without day from the further consideration of this case, and without prejudice to the prosecution of the said case, and that this case be continued, to which discharge of said jury and ruling and order of the court the said defendant excepts.

No. 1340.

Entry where Defendant charged as an Habitual Criminal.

[Caption.]

[Where jury find defendant guilty, follow form No. 1333 down to *. If defendant pleads guilty, form No. 1328, and then proceed.]

And it appearing further to the court that the said defendant, G. J., has been three times convicted, sentenced, and imprisoned in the penitentiary for three several felonies, to wit: burglary, petit larceny, and grand larceny, and burglary and larceny heretofore committed in this state as charged in the indictment in this case, the said defendant is hereby deemed and taken to be a habitual criminal. It is therefore ordered and adjudged by the court that the said defendant, G. J., at the expiration of the said term of years for which he is herein sentenced, shall not be discharged from imprisonment from the penitentiary, but shall be detained therein for and during his natural life unless pardoned by the governor, and his said liability to be so detained is hereby made a part of said sentence of said defendant to be imprisoned in the penitentiary under and pursuant to an act of the General Assembly of the state of Ohio, passed May 4, 1885.

No. 1341.

Capital Case—Entry of Filing of Precipe for Jury—Jury drawn and Venire issued to Sheriff.

[Caption.]

This day came the prosecuting attorney on behalf of the state of Ohio, this cause having been regularly assigned for trial for the —, and filed in the office of the clerk of this court his precipe for a jury of thirty-six persons, qualified electors of the — county, state of Ohio, to appear before this court on the — day of —, 18—, at — A. M. o'clock, at the courthouse in said county. Thereupon the clerk of this court in the presence of the court and —, sheriff of — county, Ohio, drew from the wheel according to law thirty-six ballots containing the names of the following persons, to wit: [names], and issued a venire facias to the sheriff of — county, Ohio, commanding him to summon the persons so drawn to appear before this court on the — day of

—, 18—, at — A. M., at the courthouse in said county, then and there to act as special jurors in the case of State of Ohio vs. W. T., and of this venire to make due return by the — day of —, 18—.

From State v. William Taylor, Franklin County Common Pleas. R. S. Sec. 7267.

No. 1342.

Capital Case continued—Entry on Return of Venire facias.

[*Caption.*]

The venire facias for a special jury in this case heretofore issued to the sheriff of — county, Ohio, and returnable this day was duly returned by said sheriff with his endorsement thereon as follows:

—county, ss.

Received this writ — day of —, 18—, and pursuant to its command on the — day of —, 18—, I served the within-named [*giving each name with the manner of service*], and after diligent search I was unable to find the within-named persons, to wit: [*state names not found*] within the county.

J. R., sheriff.

No. 1343.

Capital Case continued—Entry Ordering Alias Venire.

[*Caption.*]

It appearing from the return of the sheriff, made on the — day of —, 18—, on the venire facias heretofore issued in this case on the — day of —, 18—, and returnable —, 18—, that the following named persons, to wit: [*names*] persons named in said venire, was returned by said sheriff not found. Thereupon the clerk of this court, in the presence of this court and J. R., sheriff, drew from the jury wheel, according to law, eight ballots containing the names of the following persons, to wit: [*names*], and issued an alias venire facias to the sheriff of — county, Ohio, commanding him to summon the jurors so drawn to appear before the court of common pleas of said county on Monday morning, —, 18—, at — A. M., to act as jurors in this case, returnable forthwith.

No. 1344.

Capital Case continued—Entry upon the Return of Alias Venire.

[*Caption.*]

The alias venire facias in this case for eight additional jurors, heretofore issued to the sheriff of — county, Ohio, returnable forthwith, was this day duly returned by said sheriff, with his indorsement thereon in the words and figures following, to wit: [*copy of endorsement*].

No. 1345.

Capital Case continued—(Appointment of Stenographer)—
Impaneling of Jury.

[*Caption.*]

This day came the prosecuting attorney and assistants on behalf of the state of Ohio, and defendant in his own proper person, in the custody of the sheriff, and by counsel. And thereupon, on application of defendant, M. O'D. is appointed to take and transcribe the testimony in this case; and upon calling the alias venire heretofore issued to the sheriff of — county, Ohio, and duly returned by him, all appeared in answer thereto except [*names*], of the first venire, who were returned by the sheriff not found, and C. H., who was absent, included, there being thirty-six jurors present, to wit: [*names of those present*]. And thereupon A. S. S. was first called, sworn, and examined, and challenged for cause by state, and same sustained; J. G. was next called, sworn, examined, and challenged for cause by defendant, and same overruled, and the juror ordered to take his place in the box; L. E. was next called, and excused on being a judge of the election; S. J. I. was next called, sworn, and examined, and challenged for cause by the state, and the same sustained, [*and so on down until there are twelve jurors, and then proceed*]. And there being now twelve jurors in the box passed for cause, the court ordered that the state exercise one peremptory challenge, after which the defendant exercise twelve of his peremptory challenges before the state is allowed to call its last peremptory challenge. Thereupon the state challenges peremptorily I. D. R., and he was excused; thereupon A. N. was next called, sworn, and examined, and there being no challenge he was ordered to take his place in the box; thereupon the defendant challenged

peremptorily J. G., and he was excused; and thereupon E. N. was next called, sworn, and examined, and there being no challenge he was ordered to take his place in the box; thereupon the defendant peremptorily challenged W. H., and he was excused; thereupon W. C. was next called, sworn, and examined, and there being no challenge for cause he was ordered to take his place in the box; and thereupon the defendant challenged peremptorily J. S., and he was excused; J. R. was next called, sworn, and examined, and there being no challenge he was ordered to take his place in the box; thereupon the defendant challenged peremptorily E. N., and he was excused; G. N. was next called, sworn, and examined, and there being no challenge for cause he was ordered to take his place in the box; thereupon defendant challenged peremptorily J. A., and he was excused; thereupon C. G. was next called, sworn, and examined, and challenged by defendant for misnomer, and same overruled, and he was ordered to take his place in the box, to which defendant excepted; thereupon defendant challenged peremptorily R. G., and he was excused; and thereupon W. R. was next called, sworn, and examined, and there being no challenge for cause he was ordered to take his place in the box; thereupon the defendant peremptorily challenged C. G., and he was excused; thereupon J. P. was next called, sworn, and examined, and was challenged for cause by the state, and the same sustained; thereupon J. L. was next called, and excused by the court, he being registrar of election; thereupon J. G. was next called, sworn, and examined, and there being no challenge for cause he was ordered to take his place in the box; thereupon defendant challenged peremptorily J. R., and he was excused; thereupon J. R. N. was next called, sworn, and examined, and there being no challenge for cause he was ordered to take his place in the box; thereupon defendant peremptorily challenged T. J., who was excused; thereupon H. D. was next called, sworn, and examined, and there being no challenge he was ordered to take his place in the box; thereupon defendant challenged J. R. N., and he was excused; and the panel being exhausted, on motion, and by consent of parties hereto, the court ordered the clerk to draw from the wheel, according to law, the names of twenty persons, and issue a venire to the sheriff, commanding the persons so drawn to appear tomorrow morning at 9 o'clock, and the same was so done by C. F. G., clerk, in presence of the court and sheriff, for the following persons, to wit: [*names of persons*].

No. 1346.

Capital Case continued—Impaneling of Jury progressed.

[Caption.]

This day came the prosecuting attorney and assistants on behalf of the state of Ohio, and the defendant in his own proper person and in the custody of the sheriff and by counsel; also came the jury heretofore examined and passed for cause, to wit: [*names of jurors passed for cause*], and upon calling the special venire heretofore issued and returnable this day, [*names of jurors*] appeared in answer thereto. Thereupon F. C. M. was first called, sworn and examined, and there being no challenge for cause, was ordered to take his place in the box; [*and so on, with the exercise of the peremptory challenges. And if the panel is again exhausted, proceed*]. And the panel being exhausted the clerk was ordered to draw from the wheel, according to law, the names of — persons, and issue a venire to the sheriff, commanding them to appear forthwith, and the same was accordingly done by —, clerk, in the presence of the court and of the sheriff, for the following named persons [*names of additional jurors drawn*], and upon a call of the said venire in open court the following persons, to wit: [*names*], appeared in answer thereto. Thereupon J. B. K. was called, sworn and examined, and there being no challenge for cause, was ordered to take his place in the box.

And the panel being complete, the following named persons have been tried and accepted, to wit: [*names of twelve jurors accepted*] were duly impaneled, and the following oath administered to them:

“You and each of you shall well and truly try and true deliverance make between the state of Ohio and the prisoner at the bar, W. T., so help you God.”

Thereupon the trial of this cause progressed, and the same not being concluded, and the time of adjournment having arrived, the court adjourned the further hearing thereof to —.

No. 1347.

Capital Case continued—Entry upon Return of Verdict.

[Caption.]

This day came the prosecuting attorney and assistants on behalf of the state of Ohio, and the defendant in his own

proper person in the custody of the sheriff and by counsel; also came the jury heretofore duly impaneled and sworn in this case, and thereupon the trial of this cause progressed. And the jury having heard the evidence, arguments of counsel and charge of the court, retired to their room to deliberate upon their verdict, and after due deliberation thereon returned again into open court and presented their verdict in writing in the words and figures following, to wit: [*First style of case, etc.*] "We the jury in the case find the defendant, W. T., guilty of murder in the first degree, committed in the perpetration of robbery, in the manner and form he stands charged in the indictment, and not guilty as he stands charged in the second and third charge of the indictment.

F. C., Foreman."

Thereupon the court, at the request of the defendant, ordered that the jury be polled, and upon each juror being called by name and inquired of if the verdict just read was that of each for himself, separately answered: "It is."

No. 1348.

Capital Case continued—Entry overruling motion for New Trial and Sentence.

[*Caption.*]

This day came the prosecuting attorney and assistants on behalf of the state of Ohio, and the defendant in his own proper person, in the custody of the sheriff, and by counsel. Thereupon this cause came on further to be heard on the motion herein filed for a new trial, and the same was argued by counsel and submitted to the court. And the court upon due consideration thereof overrules said motion, to which ruling of the court defendant excepted, and the said defendant having on a former day of this term been convicted of murder in the first degree, committed in the perpetration of a robbery, was this day informed by the court of the verdict of the jury and inquired of if he had anything to say why judgment should not be pronounced against him, and after hearing his statement, it is therefore considered and adjudged by the court that the said defendant W. T. be taken hence to the jail of — county, and within the next thirty days the sheriff of — county convey the said W. T. to the Ohio penitentiary, at Columbus, Ohio, and deliver him to the warden of said penitentiary, and that he be there safely kept until the — day of —, 18—, on which day, between the

hours of 12 A. M. and sunrise of the same day, within an enclosure inside the walls of the Ohio penitentiary, prepared for that purpose, according to law, the said defendant shall be electrocuted by the warden of the Ohio penitentiary, or in case of his death, inability, or absence, by the deputy warden of said penitentiary; that said warden, or his duly authorized deputy, shall cause to pass through the body of the said defendant W. T. a current of electricity of sufficient intensity to cause death, and that the application of such current of electricity shall be continued by said warden of said penitentiary, or said deputy warden as aforesaid, until the said defendant W. T. is dead; and that said defendant W. T. pay the costs of this prosecution, taxed at \$——, for which execution is ordered.

—

No. 1348½.

Death Warrant.

(*Secs. 7388 to 7344, as amended 92 V., 159.*)

COURT OF COMMON PLEAS.

The State of Ohio, }
 _____County. }

To the Sheriff of said County:

Whereas, on the —— day of ——, in the year ——, as is shown by the record of proceedings of said court, —— was sentenced to be put to death by means of electricity, said punishment to be inflicted within the walls of the Ohio penitentiary, at Columbus, Ohio, on the —— day of ——, in the year ——, and before the hour of sunrise on said day. You are hereby commanded that within the next thirty days from this —— day of ——, in the year ——, in as private and secure a manner as is possible to be done, you convey the said —— to the Ohio penitentiary, where the said prisoner shall be received by the warden, and securely kept until the day designated for his execution.

And the warden of said penitentiary is hereby commanded to proceed, at the time and place named in this warrant, to cause a current of electricity, of sufficient intensity to cause death, to pass through the body of said ——, and to continue the application of such current of electricity to the body of said —— until he be dead; and of the manner of his execution of this warrant, and his doings thereon, he make return to the undersigned clerk of the county from which the prisoner was sentenced.

Given under my hand and the seal of said court at ——— county, this ——— day of ———, in the year ———.

_____,
Clerk of Court of Common Pleas ——— County, Ohio.

WARDEN'S RETURN.

Warden's Office, }
Ohio Penitentiary. } ———, 18—.

To the Clerk of ——— County, Ohio:

On the ——— day of ———, in the year ———, I received this, your warrant, together with the prisoner named herein, whom I securely kept until the day designated for his execution; and on the ——— day of ———, in the year ———, I caused the said ——— to be executed in the manner set forth in the foregoing warrant.

_____,
Warden Ohio Penitentiary.

—
No. 1349.

Entry Withdrawing Juror—Indictment Nollied.

[*Caption.*]

This day came the prosecuting attorney and assistant on behalf of the state of Ohio, and the defendant in his own proper person, in the custody of the sheriff, and by counsel, and the jury heretofore duly impaneled and sworn in this case, and thereupon the prosecuting attorney made a motion to withdraw a juror and enter a nolle in the case on the ground that the state had not sufficient evidence to warrant a conviction, and the court being fully advised in the premises sustains said motion and orders that a juror be withdrawn, the case nollied and the defendant discharged.

From State vs. Craft, Franklin County Common Pleas.

—
No. 1350.

Entry carrying Trial of Case from one term to another.

[*Caption.*]

This day came the state of Ohio by the prosecuting attorney and assistants, and the defendants in their own proper persons and by their counsel, and the jury heretofore impaneled herein, and this cause progressed but the same was not

concluded. This being the last day of the present term, the — term of —, 18—, of this court, and it being obvious that the trial of this cause can not be finished before said term terminates, for this cause or reason that it is proper to continue and adjourn the trial of said cause to the next term of this court, it is therefore ordered and directed that the said trial be and the same is now hereby adjourned to the first day of the next succeeding term, to wit, the — day of —, 18—, on which day the case shall proceed and be disposed of as if the trial had commenced at such succeeding term.

MISCELLANEOUS.

No. 1351.

Entry of Appointment of Assistant Prosecutor.

To the Honorable Judges of the Court of Common Pleas residing in — county, Ohio.

Gentlemen:

I hereby nominate as assistant prosecuting attorney of — county, Ohio, Mr. C. D. S., Esq., an attorney of this county, for the period of one year, from — day of —, 18—, and request his appointment by your Honor, and that his salary be fixed agreeably to Section 1271 R. S., as amended by the General Assembly of Ohio February 26, 1896.

Respectfully,

Prosecuting Attorney of — county, Ohio.

We, the undersigned judges of the Court of Common Pleas, residing in — county, Ohio, by virtue of the authority conferred upon us by an act of the General Assembly of the state of Ohio, entitled, An Act to Amend Section 1271 of the Revised Statutes of Ohio as amended February 26, 1896, do hereby appoint C. D. S., an attorney and counsellor at law, duly licensed to practice in the state of Ohio, as assistant prosecuting attorney of — county, he, the said C. D. S., having been nominated for said office by —, prosecuting attorney of said county, subsequent to the passage of said above recited act, for the period of one year from and after the — day of —, 18—, and we hereby fix the

salary of said assistant prosecuting attorney at the sum of \$—— per annum, to be payable out of the county treasury of said county as follows, to wit: in twelve monthly installments of —— dollars, that is to say, on the —— day of ——, —— dollars, and on the —— day of each and every month thereafter until said amount is paid, and said auditor is ordered to draw his warrant for said respective sums when and as they become due as specified.

Dated —— day of ——, 18——.

[Signed by the Judges.]

OATH OF ASSISTANT PROSECUTOR.

I, C. D. S., do solemnly swear that I will support the Constitution of the United States, the Constitution of the state of Ohio, and faithfully discharge the duties of assistant prosecuting attorney of —— county, Ohio, to the best of my ability.

C. D. S.

Sworn to before me and subscribed in my presence by the said C. D. S. this —— day of ——, 18——.

R. S. Sec. 1271; 92 O. L. 37.

JUDGMENT ENTRIES IN THE
PROBATE COURT.

WILLS—PRODUCTION THEREOF.

No. 1352.

Entry Upon Motion to Produce Will.

[Caption.]

This day came C. D. and filed herein a motion for the issuance of a citation directed to one E. F., alleged to have the custody of the will of one G. H., deceased, compelling him to produce said will before this court that it may be probated.

And it appearing that said C. D. is interested in said will said motion is granted, and it is ordered that a citation issue requiring said E. F. to appear in this court on the — day of — and show cause why he should not produce said alleged will for probate in this court.

R. S. Sec. 5921.

No. 1353.

Entry Ordering Attachment to Issue.

[Caption.]

This cause coming on further to be heard upon the motion heretofore filed herein for a citation against the said E. F. to produce the will of G. H., deceased, and this being the day set for the appearance of the said E. F., and he failing to appear in obedience to the order of this court, and having also failed to produce the said alleged will, it is by the court ordered that an attachment issue directed to the sheriff of this county commanding said sheriff to forthwith bring the body of the said E. F. into this court to abide such order as may be made herein.

No. 1354.

Entry Committing to Jail.

[*Caption.*]

This day came the parties hereto (the said E. F. in the custody of the sheriff, in obedience to the attachment herein before issued) and this cause coming on to be heard upon the motion to compel the said E. F. to produce a certain alleged will of the said G. H., late of this county, deceased, the said E. F. was examined concerning his refusal to produce said will, and the said E. F. still refusing to produce said will, and the court being satisfied that he has not reasonable cause for his refusal to produce said will, it is by the court ordered that the said E. F. be committed to the jail of this county, and be there confined until he shall be willing to comply with the order of this court and produce said will.

WILLS—PROBATE THEREOF.

No. 1355.

Entry of Filing of Will for Probate.

[*Caption.*]

This day came — and presented to the court a paper writing purporting to be the last will and testament of C. D., late of said county, deceased, and made application for its admission to probate as the last will and testament of said C. D., deceased. It is therefore ordered that due notice according to law be given to the widow and next of kin residing in Ohio of the filing thereof, and of the time set for the hearing of said application, and that said application be set for hearing on the — day of —, 18—.

No. 1356.

Entry of Taking Testimony—Admitting Will to Probate.

[*Caption.*]

This day this cause came on to be heard upon the application heretofore filed herein for the admission to probate a

paper writing purporting to be the last will and testament of C. D., deceased; and it appearing to the court that due and legal notice has been given to the widow and all the next of kin of the said C. D., deceased, residing within the state of Ohio, the said subscribing witnesses to said will thereupon appeared and testified concerning the due execution of said will, which said testimony was reduced to writing, and by said witnesses subscribed and filed herein with said will. *

And the court being fully advised in the premises finds that said instrument of writing is the last will and testament of the said C. D., deceased; that the same was duly and legally executed, and that the said C. D., at the time of making and executing said will, was of legal age, of sound mind and memory, and not under any restraint.

It is therefore considered, ordered and adjudged that the said will be and the same is hereby admitted to probate, that the same with all of the testimony taken be duly recorded in the records of will in this court.

NOTE.—R. S. Sec. 5929. If there be interlineations in the will, the court ought to make a finding that they were made before the execution of the will.

R. S. Sec. 5926.

No. 1357.

Entry ordering Commission to issue to take Testimony.

[*Caption.*]

[*Proceeding from * in ante No. 1356.*]

And it appearing to the court that A. B., one of the subscribing witnesses to said will does not reside in this county, but is a resident of —, it is therefore ordered that a commission with the will annexed issue, directed to C. D., empowering and requiring him to take the testimony of the said A. B., said subscribing witness to said will, and to return the same without delay to this court.

R. S. Sec. 5928.

No. 1358.

Entry taking Testimony of one Witness and Cause Continued.

[*Caption.*]

This day this cause came on to be heard upon the application heretofore filed herein for the admission to probate of a paper writing, purporting to be the last will and testament

of C. D., deceased, and the court find that due notice according to law has been given to the widow and all of the next of kin of said decedent residing within the state of Ohio.

And thereupon came E. F., one of the subscribing witnesses to said paper writing, who was duly sworn according to law and testified as to the due execution of said will, whose testimony was reduced to writing and filed herein. And thereupon said cause is continued for further testimony.

No. 1359.

Entry taking Testimony of remaining Witness and Admitting Will to Probate.

[*Caption.*]

This day came H., the other subscribing witness to the paper writing heretofore filed herein, purporting to be the last will and testament of C. D., deceased, and testified concerning the due execution of said will, which said testimony was reduced to writing and subscribed by said witness and filed herein.

And this cause coming on further to be heard, and the court being fully advised in the premises, finds from the testimony that said instrument of writing is the last will and testament of the said C. D., deceased, that the same was duly and legally executed according to law, and that the testator was at the time of the making and execution of said will of legal age, of sound mind and memory, and not under any restraint.

It is therefore by the court ordered and adjudged that the said will be and the same is hereby admitted to probate, and that the same, together with the testimony of the subscribing witnesses thereto, be recorded in the record of wills of this court.

R. S. Sec. 5929.

No. 1360.

Entry of Refusal to Admit Will to Probate.

[*Caption.*]

This day this cause came on to be heard upon the application heretofore filed herein, to admit to probate a certain paper writing purporting to be the last will and testament of C. D., deceased. And the court finds that due notice,

according to law, has been given to the widow and next of kin of said decedent residing in the state of Ohio, of the filing of said application, and of the time set for the hearing thereof.*

And thereupon came A. and B., the subscribing witnesses to said will, who, being duly sworn, testified concerning the execution thereof, which said testimony was reduced to writing, and by said witnesses subscribed and filed herein.

And the court being fully advised in the premises finds from the testimony taken herein that the said decedent, at the time of making and executing said will, was not of sound mind and memory, and the court does therefore refuse to admit said alleged will to probate. And thereupon came —, and gave notice of his intention to appeal from this decision to the court of common pleas of said county.

R. S. Secs. 5934, 5935.

No. 1361.

Entry when Testimony is Taken as to Genuineness of Signatures of Subscribing Witnesses.

[*Caption.*]

[*Proceeding from * in ante No. 1360.*]

And it appearing to the court that A. and B., the subscribing witnesses to said paper writing, are deceased, thereupon came E. and F., who were duly sworn and examined concerning the genuineness of the signatures of said subscribing witnesses, whose testimony was reduced to writing and filed herein with said will.

And thereupon came also — and —, who were duly sworn, according to law, and testified as to the mental condition of said deceased, whose testimony was reduced to writing and subscribed by such witnesses, and filed herewith, and the court being fully advised finds from the testimony so adduced that the said paper writing is the last will and testament of the said C. D., deceased, and that the same was duly executed and attested, and that at the time of its execution said testator was of full age, of sound mind and memory, and not under any restraint.

It is therefore ordered that said will be admitted to probate, and that the same, together with all the evidence taken herein, be entered of record in the record of wills of this court.

R. S. Sec. 5929.

No. 1362.**Entry upon return of Commission—And Admission to Probate.**

[*Caption.*]

This day the commission heretofore issued herein to —, of —, to take the testimony of —, one of the subscribing witnesses to the will of said C. D., deceased, was returned and filed herein. *

And thereupon this cause coming on further to be heard, and the court being fully advised, does find from the testimony taken herein that the said paper writing is the last will and testament of the said C. D., deceased; that the said testator at the time of making and executing the same was of full age, and of sound mind and memory, and not under any restraint.

It is therefore ordered that the said will be admitted to probate, and that the same, together with the testimony heretofore taken, be entered in the record of wills of this court.

R. S. Sec. 5929.

No. 1363.**Entry admitting Authenticated Copy of Will to Record.**

[*Caption.*]

This day came — and produced to the court an authenticated copy of the last will and testament of C. D., late of — county, Indiana, deceased, for record herein.

And the court having carefully examined said authenticated copy, and being satisfied that the said will of the said C. D., deceased, was duly executed and proved according to the laws of the said state of Indiana, and that there is property situated in this county belonging to said testator which is devised by said will, it is hereby ordered that said copy be and the same is hereby admitted to record in this court.

R. S. Secs. 5937-40.

No. 1364.**Entry admitting Authenticated Copy to Record in another County in the State.**

[*Caption.*]

This day came — and produced to the court for record an authenticated copy of the last will and testament of C. D.,

late of — county, Indiana, together with a copy of an order made by the probate court of — county, Ohio, admitting said authenticated copy to record therein, duly certified thereto by the probate judge of said county under the seal of said court.

And it appearing to the court that there is property belonging to the said C. D., deceased, and devised by him in said will, which is situated in this county, it is ordered that the said certified copy of said will and said order for record be filed and recorded in this court according to law.

No. 1365.

Entry of filing of Authenticated Copy and continuance of Hearing.

[*Caption.*]

This day a paper writing purporting to be the last will and testament of C. D., deceased, late of London, England, and of the probate thereof, was presented by A. B., who made application for the admission of the same to probate and record herein.

Whereupon it is ordered that notice of the filing of such application be given to all persons interested according to law, and the said application to admit to probate and record is hereby continued to —.

NOTE.—R. S. Sec. 5939.

No. 1366.

Entry Admitting Foreign Wills to Probate.

[*Caption.*]

This day this cause came on to be heard upon the motion heretofore made herein for the admission of a certain paper writing purporting to be the last will and testament of C. D., deceased, late of London, England, and the court being satisfied that due notice hereof has been given according to law, the court having carefully examined said authenticated copy of said will and probate thereof, and it appearing therefrom that said will was executed and proved according to the laws of England, and that there is property in this county devised in said will, and that the same should be allowed and recorded herein, it is therefore ordered that said authenticated copy be and the same is hereby admitted to record in this court.

R. S. Sec. 5938.

No. 1367.

Entry of Filing of Application to Admit Spoliated Will to Probate.

[Caption.]

This day came A. B. and filed herein an application alleging that C. D., late of — county, Ohio, deceased, died leaving in existence at the time of his death a certain will which has been destroyed since his death, and made application for the admission of the same to probate. It is therefore ordered that written notice be given of the filing of said application to all persons whose interest it may be to resist the probate, residing within the county of —, and of the time set for the hearing thereof according to law, which the court fixes for the — day of —, 18—, at — o'clock — M.

NOTE.—R. S. Secs. 5944, 5945.

No. 1368.

Entry Admitting Spoliated Will to Probate.

[Caption.]

This day this cause came on to be heard upon the application heretofore filed herein for the admission to probate of a certain will of the said C. D., deceased, alleged to have been destroyed subsequent to his death, and the court being satisfied that due and proper notice has been given as required by law to all persons interested in said will, residing in said county of —, thereupon came — and —, the subscribing witnesses to said will, and also —, — and —, who were duly sworn according to law, and testified concerning the execution of said will and the contents thereof, which said testimony was reduced to writing and by said witnesses severally subscribed and filed herein.

And the court being fully advised, and upon a careful consideration of said testimony, finds that the said C. D., deceased, did, on the — day of —, make and execute his last will and testament according to law, and that said will remained unrevoked at the time of his death, but that the same has been destroyed since his death, and that the said testator at the time of making and executing said will was of full age, of sound mind and memory, and not under restraint.

And the court further finds the following to be substantially the contents of said will of said testator: [*Set out the contents of the will as established by the court.*]

It is therefore ordered that said will be and the same is hereby admitted to probate, and that the same, together with the testimony taken herein, be entered of record in the record of wills of this court.

NOTE.—R. S. Secs. 5946, 5947.

No. 1369.

Entry Admitting to Record Authenticated Copy of Destroyed Will.

[*Caption.*]

This day came A. B., and presented to the court a copy of the last will and testament of C. D., deceased, and made application for the admission of the same to record herein, in lieu of the record of said will heretofore destroyed.

And it appearing to the court that the record of said original will has been destroyed, and that the copy presented is a true copy of the original will of the said C. D., deceased, it is ordered that the same be recorded in this county, according to law.

NOTE.—R. S. Sec. 5949.

No. 1370.

Entry Admitting Nuncupative Will to Probate.

[*Caption.*]

This day came A. B., and represented to the court that C. D., late of — township, — county, Ohio, deceased, died on the — day of —, 18—, and that during his last sickness made a nuncupative will. And thereupon came E. F. and G. H., who were witnesses to the speaking of said testamentary words by the said C. D., deceased, who were duly sworn, according to law, and testified concerning the speaking of said testamentary words, whose testimony was reduced to writing, and by them subscribed and filed herein. And the court being fully advised, and upon a careful consideration of said testimony, finds that on the — day of —, 18—, the said C. D., being in his last sickness, at his residence in — township, — county, Ohio, in the presence of the said E. F. and G. H., two competent, disinterested

witnesses, did speak the following testamentary words, which were reduced to writing, on the — day of —, 18—, and are as follows: [*Copy nuncupative will*].

And the court being satisfied that the said testator was of sound mind and memory, and not under any restraint, and that he called upon said witnesses, at the time the said testamentary words were spoken, to bear testimony to said disposition as his will, and that said witnesses are competent and disinterested, it is ordered that the said testamentary words be and the same are hereby admitted to probate as the verbal will of the said C. D., deceased, and that the same, together with the testimony of the witnesses, be entered of record in this court.

R. S., Secs. 5991, 5992.

ELECTION OF WIDOW.

(R. S. Secs. 5963—5966.)

No. 1371.

Entry ordering Citation to Widow to make Election.

[*Caption.*]

The last will and testament of C. D., deceased, having been heretofore duly admitted to probate herein, it is ordered that a citation issue to —, widow of said deceased, requiring her to appear in this court within twelve (12) months after the service of said citation upon her and make known to this court whether she will elect to take the provisions made for her by said will, or whether she will reject said will and take under the law.

NOTE.—R. S. Sec. 5963.

No. 1372.

Entry of Election of Widow.

[*Caption.*]

This day came —, widow of the said C. D., deceased, in obedience to the citation heretofore issued herein requiring her to appear and make her election under the will.

And the court having fully explained and made known to her the provisions of said will and her rights under it, as well as her rights under the law, the said ——— elected to take under said will.

No. 1373.

Entry ordering Commission to issue to take Election of Widow.

[*Caption.*]

It appearing to the court that A. B., widow of C. D., late of said county, deceased, is unable by reason of ill health to appear in person in this court and make her election whether she will take under the will of C. D., deceased, or not, it is by the court ordered that a commission issue to one E. F., with a copy of the will of said testator annexed thereto, requiring him to proceed without delay and take the election of said widow according to law.

No. 1374.

Entry of return of Commission.

[*Caption.*]

This day the commission heretofore issued herein to ———, requiring him to take the election of A. B., widow of said C. D., deceased, was returned and filed herein, and it appears from said return that the said widow elects to take under the will, and the same is hereby entered of record herein.

No. 1375.

Entry appointing person to ascertain value of Rights of Insane or Imbecile Widow.

[*Caption.*]

It being made satisfactorily to appear to the court that A. B., widow of C. D., deceased, is by reason of insanity unable to appear in this court and make her election under the will of her said husband, it is ordered that E. F. be and he is hereby appointed and required to ascertain the value of the provision made by said testator for said widow in lieu of the provisions made by law, and the value of the rights by law in the estate of the deceased husband and report the results of his investigation herein without delay.

NOTE.—R. S. Sec. 5966.

No. 1376.

**Entry Upon Report of Commissioner Declaring Election of
Insane Widow.**

[*Caption.*]

This day came E. F., heretofore appointed herein to ascertain the value of the provision made by the said C. D., deceased, in his will for his widow, A. B., and also the value of her interest by law in the estate of said testator, and filed his report herein, and the court having carefully examined said report, and being satisfied that the provision made in said will is more advantageous and for the best interest of the said widow than her rights under the law, does now enter and declare an election for said widow to take the provisions made for her in the will of said decedent.

TESTAMENTARY TRUSTEES.

(*R. S. Secs 5981—5990.*)

No. 1377.

Entry Appointing Trustee.

[*Caption.*]

This day came A. B., named in the last will and testament of C. D., deceased, heretofore admitted to probate herein, and made application to be appointed as such trustee, and filed herein a statement of the property to be administered by him as such trustee under said will.

It is therefore ordered by the court that the said A. B. be and he is hereby appointed trustee under said will, and that he enter into a bond in the sum of \$——, as such trustee, conditioned according to law, with sureties to the approval of this court. And thereupon came the said A. B., and accepted said appointment and filed herein his bond in the sum of \$——, with B. H. and I. J. as sureties, which bond is approved by the court.

It is thereupon ordered that letters of trusteeship under the will of said C. D., deceased, issue to said A. B., and that he proceed to administer said trust according to the terms of said will and the law.

No. 1378.

Entry Appointing Person to Execute Trust Upon Declination of Trustee.

[*Caption.*]

A. B., named in the last will and testament of C. D., deceased, as trustee, having declined to act, it is by the court ordered that E. F. be and he is hereby appointed trustee to execute said trust according to the will, and that he enter into a bond as such trustee in the sum of \$——.

And thereupon came the said E. F. and filed herein his bond in the sum of \$——, with —— and —— as sureties, which bond is approved by the court.

R. S. Sec. 5986.

No. 1379.

Entry Authorizing Foreign Trustee to Act.

[*Caption.*]

This day came A. B. and filed herein a duly authenticated copy of his appointment as trustee under the will of C. D., late of ——. And the court upon examination thereof finds that said appointment was duly and legally made according to the laws of ——, and that there is land situated in this county belonging to the said deceased, it is ordered that letters of trusteeship be granted to the said A. B. under said will and that he enter into a bond as such trustee in the sum of \$——, conditioned according to law.

And thereupon the said A. B. filed herein his bond as such trustee in the sum of \$——, with —— and —— as sureties, which is approved by the court. And the said A. B. is thereupon authorized to execute the trust in this county.

NOTE.—R. S. Sec. 5987.

APPOINTMENT OF EXECUTORS AND ADMINISTRATORS.

(R. S. Secs. 5994—6022.)

No. 1380.

**Entry appointing Executor—Appraisement dispensed with—
Inventory ordered.**

[*Caption.*]

This day came A. B., named in the last will and testament of C. D., deceased, as the executor thereof, and accepted said appointment and filed herein an estimate of the value of said estate.

It is therefore ordered by the court that the said A. B. be and he is hereby appointed executor of the last will and testament of the said C. D., deceased, and that he enter into a bond as such executor in the sum of \$—— (—— dollars), conditioned according to law, with sureties to the approval of the court. [*Or, if no bond is required say:* and the will having expressed a desire that the said A. B. be not required to give bond as such executor the same is hereby dispensed with by the court.]

And thereupon came the said A. B. and filed herein his bond in the sum of \$——, with —— and —— as sureties, which said bond is approved by the court. It is therefore ordered that letters testamentary issue to the said A. B. And the said testator having expressed a desire in his said will that an appraisement of his personal goods and chattels be dispensed with, it is ordered that no appraisement be made, but that the executor make and return herein an inventory without appraisement of the personal property belonging to said estate.

R. S. Secs. 5994, 5995.

No. 1381.

Entry appointing Widow or Next of Kin.

[Caption.]

This day came A. B., widow (or son) of C. D., late of said county, deceased, and filed herein an application to be appointed administrator of the estate of said C. D., deceased, and filed herein an estimate of the estate of said deceased.

It is therefore ordered by the court that the said A. B. be and she is hereby appointed administratrix of the estate of C. D., deceased, and she is ordered to enter into a bond as such administratrix in the sum of \$—— to the approval of this court. And thereupon came the said A. B. and filed her bond herein in the sum of \$——, conditioned according to law, with E. F. and G. H. as sureties thereon, which bond is approved by the court.

It is therefore ordered that letters of administration issue to the said A. B. as such administratrix, and that she proceed to administer said estate according to law.

It is further ordered that ——, ——, and —— be and they are hereby appointed appraisers.

R. S. Sec. 6005.

No. 1382.

Entry Ordering Citation to Widow and Next of Kin.

[Caption.]

Upon motion, it is ordered that a citation issue requiring ——, widow, and ——, next of kin of C. D., late of said county, deceased, to appear on or before the —— day of ——, 18——, and make known whether or not they will accept or decline the administration of the estate of the said C. D., deceased, and that return be made of said citation on or before said date.

No. 1383.

Entry of Appointment Upon Declination of Widow or Next of Kin.

[Caption.]

The widow and next of kin of C. D., deceased, having filed herein their declination to accept the administration of said estate, thereupon came A. B. (et al.), and filed herein their

declination to accept the administration of said estate; thereupon came E. F., and filed herein an application to be appointed administrator of the estate of said C. D., deceased, and also a statement of the value of the estate of said decedent.

It is therefore by the court ordered that the said E. F. be and he is hereby appointed administrator of said estate of said C. D., deceased, and he is ordered to enter into a bond as such administrator in the sum of \$——, conditioned according to law, with sureties to the approval of the court. And thereupon came the said A. B., and accepted said appointment, and presented his bond in the sum of \$——, with —— and —— as sureties, which said bond is approved by the court and filed herein. It is therefore ordered that letters of administration issue to the said A. B. as such administrator, and that he proceed, according to law, to administer said estate. It is further ordered that ——, —— and —— be and they are hereby appointed appraisers.

No. 1384.

Entry Appointing Special Administrator.

[*Caption.*]

Upon motion, and for satisfactory reasons, it is by the court ordered that A. B. be and he is hereby appointed special administrator of the estate of C. D., deceased, and he is ordered to enter into a bond in the sum of \$——.

And thereupon came A. B. and accepted said appointment, and filed herein his bond as such special administrator in the sum of \$——, conditioned according to law, with —— and —— as sureties thereon, which bond is approved by the court.

It is therefore ordered that the said A. B. proceed to collect and preserve the effects of the estate of said decedent until letters testamentary, or of administration, may be granted.

R. S. Secs. 6007-II.

No. 1385.

Entry Appointing Administrator, with the Will Annexed.

[*Caption.*]

A. B., named in the last will and testament of C. D., deceased, as the executor thereof, having declined to accept

said trust, thereupon came E. F., and filed herein his application to be appointed administrator with the will annexed of the estate of said C. D., deceased, and also a statement of the value of said estate, and also a declination of the widow and next of kin to administer said trust.

It is therefore by the court ordered that said E. F. be and he is hereby appointed administrator with the will annexed of the estate of said C. D., deceased, and he is ordered to enter into a bond in the sum of \$——, conditioned according to law, with sureties to the approval of this court; and thereupon came the said E. F., and filed herein his bond in the sum of \$——, conditioned according to law, with —— and —— as sureties, which said bond is approved by the court.

It is therefore ordered that letters of administration upon the estate of said C. D., deceased, be issued to the said E. F., and that he proceed to administer said estate according to the will and the law.

R. S. Sec. 6000.

No. 1386.

Entry Appointing Administrator de bonis non.

[Caption.]

This day came A. B., administrator of the estate of C. D., deceased, and filed herein his resignation as such administrator, which is accepted by the court.

And thereupon came C. D., and filed herein his application to be appointed administrator *de bonis non* of the estate of the said C. D., deceased, and also a statement of the value of said estate. It is therefore ordered that the said —— be and he is hereby appointed administrator *de bonis non* of the estate of the said C. D., deceased, and he is ordered to enter into a bond in the sum of \$——, conditioned according to law, with sureties to the approval of the court; and thereupon came the said —— and accepted said appointment, and filed his bond herein in the sum of \$——, conditioned according to law, with —— and —— as sureties, which said bond is approved and filed.

It is thereupon ordered that letters of administration *de bonis non* issue to the said ——, and that he proceed to administer the estate not yet disposed of according to law.

R. S. Sec. 6018.

No. 1387.

Entry Granting Leave to give Notice of Appointment.

[*Caption.*]

This day came A. B., administrator [*or*, executor of the last will and testament] of C. D., deceased, and filed herein his petition representing that by accident he failed to give notice of his appointment within the three months limited by law for that purpose and asking leave to give such notice now.

It is therefore ordered by the court that the said administrator be and he is hereby granted leave to give such notice forthwith according to law.

R. S. Sec. 6088.

**RESIGNATION, DEATH OR REMOVAL OF
EXECUTOR OR ADMINISTRATOR.**

(*R. S. Secs. 6015—16—17.*)

No. 1388.

Entry of Resignation of Administrator.

[*Caption.*]

This day came —, administrator of the estate of —, deceased, and tendered and filed his resignation as such administrator, which the court for satisfactory reasons accepts.

[*Then may follow appointment of new administrator as in ante No. 1383.*]

R. S. Sec. 6015.

No. 1389.

Entry Removing Administrator.

[*Caption.*]

This cause coming on to be heard upon the motion heretofore filed herein for an order to remove A. B., administrator

of the estate of C. D., deceased, and the court having heard the evidence adduced, and due notice hereof according to law having been given to said administrator, finds that said administrator has failed to file an account of his administration according to law [*or other reasons*], it is by the court ordered that the said A. B. be and he is hereby removed as such administrator and his letters of administration revoked.

R. S. Sec. 6017.

ADMINISTRATION BOND — RELEASE OF SURETIES, ETC.

(*R. S. Secs. 6204—6216.*)

No. 1390.

Entry of Filing of Application of Surety to be Released.

[*Caption.*]

This day came M., one of the sureties on the bond of D., as administrator of the estate of F., deceased, and filed herein his application to be released as such surety.

It is therefore ordered that said application be set for hearing on the — day of —, 18—, at — o'clock —M., and that said — give said administrator notice in writing according to law.

R. S. Sec. 6204.

No. 1391.

Entry Releasing Surety.

[*Caption.*]

This day this cause coming on to be heard upon the application of —, heretofore filed herein, to be released as surety upon the bond of —, administrator of the estate of —, deceased, and it appearing to the satisfaction of the court that due notice has been given of the filing and of the time set for the hearing of said application, and it appearing to the court that there is good reason for granting said ap-

plication, it is ordered that the said — be and he is hereby released and discharged from further liability upon said bond, and that [the said —, as such administrator, enter into a new bond in the sum of \$—, with sureties according to law, on or before —, 18—.

R. S. Sec. 6204.

No. 1392.

Entry of filing of New Bond upon Release of Surety.

[*Caption.*]

This day came A. D., administrator of the estate of E. F., deceased, and filed herein a new bond in obedience to the order of the court in the sum of — dollars, conditioned according to law, with — and — as sureties, which said bond is approved by the court and ordered recorded.

No. 1393.

Entry of Removal when New Bond not filed as per Order.

[*Caption.*]

It appearing to the court that A. D., administrator of the estate of —, deceased, has failed to comply with the order of the court heretofore made requiring him to give an additional (*or*, a new bond) in the sum of \$—, with sureties to the approval of the court, on or before —, 18—, and that said A. D. has not filed such additional bond as required of him, it is ordered that he be and he is hereby removed from his trust as administrator of said estate and his letters revoked, and he is required to file an account of his doings as such administrator on or before —, 18—.

[*A new appointment may be made in same entry as in ante No. 1383.*]

No. 1394.

Entry ordering Administrator to give Bond of Indemnity.

[*Caption.*]

This day this cause came on for hearing upon the application of M. R., surety upon the bond of N. O., administrator [*or*, executor of the will] of the estate of C. D., deceased, for

an order requiring said administrator to render an account, and to execute to said M. R. a bond of indemnity; and it appearing to the court that said administrator has had due and proper notice hereof, and the court being satisfied that said administrator has unfaithfully administered said estate, it is ordered that he render an account of his acts and doings as such administrator to this court on or before —, 18—, and that he enter into a bond of indemnity to said M. R. as such surety, in the sum of \$—— within — days hereof, with sureties to the approval of this court.

R. S. Sec. 6208.

No. 1395.

Entry Removing Administrator upon failure to give Bond of Indemnity.

[*Caption.*]

It appearing to the court that N. O., administrator of the estate of C. D., deceased, has neglected and failed to execute to M. R., surety upon his bond as such administrator, a bond of indemnity as required by a former order of this court, and good cause being shown herefor, it is ordered that N. O. be and he is hereby removed from his trust as administrator of such estate, and his letters revoked, and that he file an account herein on or before —, 18—.

R. S. Sec. 6208.

No. 1396.

Entry authorizing Suit upon Administration Bond.

[*Caption.*]

This cause coming on to be heard upon the motion of — (a creditor, next of kin, etc.) for an order authorizing him to bring suit upon the bond of A. B. as administrator [*or*, executor] of the estate of C. D., deceased, and it appearing as represented by said — that said administrator [*or*, executor] has failed to perform his duty as represented by said — in his said motion, it is ordered that he be and he is hereby authorized to bring suit upon the bond of said A. B. as administrator of said estate.

R. S. Sec. 6212.

INVENTORY AND APPRAISEMENT.

(*R. S. Sec. 6023.*)

No. 1397.

Appointment of Appraisers.

R. S. Sec. 6023. Usually, if not always, made when appointment is made. *Ante* No. 1381.

No. 1398.

Appraisement Dispensed with.

R. S. Sec. 6023. Made as in *ante* No. 1380.

No. 1399.

Entry of Filing of Inventory and Appraisement.

[*Caption.*]

This day came R. S., administrator of the estate of A. B., deceased, and returned and filed herein an inventory and appraisement of the property and assets of said estate. And the court upon examination thereof, finding the same in all respects regular and correct, does therefore approve and confirm the same and order that it be duly entered of record herein.

No. 1400.

Entry ordering Citation to Return Inventory.

[*Caption.*]

It appearing to the court that A. B., administrator of the estate of C. D., deceased, has neglected and refused to return an inventory and appraisement of the property and assets of said estate within three months after his appointment, as required

by law, it is ordered by the court that a citation issue requiring said administrator to make return and file herein an inventory, according to law, on or before —, 18—.

R. S. 6047.

No. 1401.

Entry ordering Attachment of Administrator for Failure to Obey Citation to return Inventory.

[Caption.]

It having been made to appear to the court that A. B., administrator of the estate of C. D., deceased, has been served personally with a citation issued from this court requiring him to return an inventory and appraisement of the estate of the said C. D., deceased, on or before the — day of —, 18—, and that said A. B., as such administrator, has wholly failed and refused to comply with said order of court and said citation, it is therefore ordered that an attachment issue herefrom, directed to the sheriff of this county, commanding him to attach the person of the said A. B. and bring his body before this court that he may answer for his disobedience to comply with the order of this court.

NOTE.—Although the Statute, Sec. 6048, authorizing an attachment against the administrator has been repealed, nevertheless the court has power, independently thereof, to punish an administrator for violating an order of court, as for contempt, and it is believed, therefore, that the foregoing entry is good.

No. 1402.

Entry removing Administrator for Failure to File and Return Inventory as ordered.

[Caption.]

R. S., administrator, having failed and neglected to comply with the order of this court, heretofore made herein, requiring him to return an inventory of the property and assets of the estate of the said A. D., deceased, within the time required by said order, it is ordered by the court that the said R. S. be and he is hereby removed from his said trust, as administrator of said estate, and his letters of administration revoked. And it is further ordered that said R. S. make, render, and file an account of his doings as such administrator on or before —, 18—.

No. 1403.**Entry of Filing of Exceptions to Inventory.**

[*Caption.*]

This day came [name], one of the heirs at law of the said decedent, A. B., [*or a creditor of said estate*], and filed his written exceptions to the inventory of R. S., as administrator of the estate of the said A. B., deceased. It is ordered that the same be set for hearing on the — day of —, 18—, and that the said [name] cause a written notice thereof to be given to the said R. S., as such administrator, not less than five days before the said — day of —, 18—.

R. S. Sec. 6024.

No. 1404.**Entry Upon Hearing of Exceptions.**

[*Caption.*]

This cause coming on for hearing upon the exceptions filed herein by [name] to the inventory filed herein by R. S., as administrator of the estate of A. D., deceased, and it appearing to the court that due notice thereof has been given to the said administrator as required by law, said exceptions and the evidence adduced by the parties were submitted to the court. On consideration thereof, and being fully advised, the court finds that the said exceptions are well taken in the following particulars, and to that extent does sustain the same, to wit: [*state*].

It is therefore considered and adjudged by the court that [*follow with whatever the order may be*].

R. S. Sec. 6023.

No. 1405.**Entry Reviewing Allowance to Widow.**

[*Caption.*]

This cause came on this day to be heard upon the petition of A. B., widow of C. D., deceased, to review the allowance made to her by the appraisers heretofore appointed to appraise the estate of the said C. D., deceased, and for an increase of the amount so allowed to her; and the court having heard the evidence adduced by the parties, and being fully

advised in the premises, finds that the sum so set off and allowed to such widow by said appraisers is not an adequate sum for her support, but that the sum of \$—— is necessary for the support of said widow for one year.

It is therefore ordered by the court that said allowance so made by said appraisers be and the same is hereby set aside; and it is further ordered that E. F., administrator of the estate of the said C. D., deceased, pay to said widow the said sum of \$—— out of the moneys first coming into the hands of the said administrator belonging to said estate.

NOTE.—R. S. Sec. 6043.

No. 1406.

Entry Ordering New Assets After Return of First Inventory and Appraisement.

[*Caption.*]

This day came A. B., administrator of the estate of C. D., deceased, and represented that certain assets and property belonging to said estate has come to his knowledge [*or, possession*]; it is therefore upon motion of said administrator hereby ordered that said property be appraised upon the oaths of E. F., G. H. and I. J., and that the said administrator return an inventory and appraisement of said property on or before the —— day of ——, 18——.

NOTE.—R. S. Sec. 6061. The return must be made within two months after the discovery.

CONCEALMENT OF ASSETS.

(*R. S. Secs. 6053—6060.*)

No. 1407.

Entry Upon Complaint for Concealing Assets.

[*Caption.*]

This day came A. B., administrator of the estate of C. D., deceased, and filed herein a complaint, charging —— with concealing assets belonging to the estate of said deceased.

It is therefore ordered that a citation issue requiring the said — to appear before this court on the — day of —, 18—, and be examined on oath touching the matter of said complaint.

R. S. Sec. 6054.

No. 1408.

Entry Ordering Attachment of Person Charged with Concealing Assets for Contempt in Refusing to Obey Citation.

[*Caption.*]

It having been made to appear to the court that A. B., against whom a citation has been heretofore issued from this court, requiring him to appear on the — day of —, and be examined concerning an alleged charge of concealing certain assets belonging to the estate of C. D., deceased, it is ordered by the court that a writ of attachment issue, directed to the sheriff of this county, commanding said sheriff to attach the body of the said A. B., and bring him forthwith into this court, to show cause why he shall not be punished for the violation of the said order so as aforesaid made in this behalf.

No. 1409.

Entry Ordering Person Charged with Concealing Assets to be Committed to Jail for Failing to Answer Questions.

[*Caption.*]

This day this cause coming on to be heard upon the complaint heretofore filed herein against the said E. F., charging him with the concealment of certain assets described therein, and the cause proceeding to trial, the said E. F. refused to answer certain questions propounded to him during the progress of such examination, and the said E. F. still refusing to answer said questions after having been ordered to do so by this court, it is therefore considered and ordered that the said E. F. be committed to the jail of this county, and be there confined until he shall be ready and willing to answer the questions so propounded to him, or until he shall be otherwise discharged.

R. S. Sec. 6054.

No. 1410.

Entry Not Sustaining Charge of Concealment of Assets.

[Caption.]

This cause coming on further to be considered, upon the complaint hereinbefore filed by —, charging —, administrator of the estate of C. D., deceased, with having concealed certain assets belonging to the estate of said C. D., deceased, as therein described, neither party having demanded trial by jury; and the court having heard the examination of the accused [*naming him*], and the other testimony adduced by the parties, finds therefrom that the said — has not been guilty of concealing assets belonging to said estate, as charged in said complaint, and does therefore discharge him herefrom.

R. S. Sec. 6057.

No. 1411.

Entry finding Accused Guilty of Concealment of Assets, and Judgment thereon.

[Caption.]

This day this cause came on to be heard upon the complaint hereinbefore filed by — [*or, by A. B., administrator of the estate of C. D., deceased, or creditor, devisee, legatee, heir or other interested person, as the case may be*] and the parties hereto having waived their right to trial by jury the cause proceeded to hearing before the court. And the court having heard the examination of —, who is accused of concealing the assets of said estate, and of the other witnesses, and being fully advised in the premises finds that said — is guilty as charged in the complaint of having concealed [*or, embezzled, or, conveyed away*] the property described in the said complaint, the value of which property the court finds to be the sum of \$—, and that the said estate has been damaged by reason thereof in the sum of \$—.

It is therefore considered, ordered and adjudged that [*where the accused is not the administrator*] A. B., the administrator of the estate of the said C. D., deceased, recover from the said — the said sum of \$—, being the value of the property so as aforesaid found to have been concealed, together with ten percent penalty and the costs of this proceeding, taxed at \$—.

[When the judgment is against the administrator or executor it may be in the following form:]

It is therefore considered and adjudged that the state of Ohio, for the use and benefit of the estate of C. D., deceased, recover from the said A. B., administrator as aforesaid, the sum of \$——, the value of the property aforesaid, together with a penalty of ten percent, and the costs of this proceeding herein, taxed at \$——.

NOTE.—R. S. Sec. 6057. The entry should show a waiver of trial by jury as that right exists. In order to make the money upon such a judgment, a transcript thereof should be filed with the clerk of the common pleas court, and thenceforth proceedings on execution will be had as in ordinary cases.

NOTE.—R. S. Sec. 6058.

COMPOUNDING WITH DEBTOR.

No. 1412.

Entry authorizing Administrator or Executor to Compound with Insolvent Debtor.

[Caption.]

This day came A., administrator [*or*, executor] of the estate of B., and represented to the court that one C. is indebted to said estate in the sum of \$——, but that he is insolvent and unable to pay all of his debts, including the one due said estate, in full, and asks for an order authorizing him to compromise and compound said claim.

And the court finding that such representations are true, and believing it to be for the best interests of the estate of said B., deceased, does therefore authorize said administrator to receive from the said C. the sum of \$—— in full satisfaction of said claim.

NOTE.—R. S. Sec. 6073.

ACTIONS TO COMPLETE CONTRACTS.

No. 1413.

Entry of Filing of Petition—Time Set for Hearing.

[Caption.]

This day came A. B., administrator of the estate of C. D., deceased, and filed herein his petition for authority to complete a certain contract therein alleged to have been entered into by the said C. D., deceased, with one E. F.

It is ordered by the court that notice be given to all of the heirs at law of said C. D., defendants herein, according to law, and that said petition be set for hearing on the — day of —.

R. S. Sec. 5800.

No. 1414.

Entry Ordering Administrator to Complete Contract.

[Caption.]

This day this cause came on to be heard upon the petition heretofore filed herein by A. B., administrator of C. D., deceased, for authority to complete a contract alleged to have been entered into by said decedent with one E. F., for the sale and conveyance of certain premises therein mentioned and described. And the court having heard all the evidence adduced by the parties, and being fully satisfied that due and legal notice has been given to all the defendant heirs at law of the said C. D., deceased—persons interested in this proceeding—and being fully advised in the premises, finds that the allegations of said petition are true; that the said C. D. did, during his lifetime, enter into a contract with the said E. F., by which it was agreed that he would, for the consideration of \$—, sell and convey to said E. F. the premises in the petition described.

It is therefore ordered and adjudged by the court that the said A. B., administrator aforesaid, be and he is hereby authorized and empowered to complete and carry out said

contract according to its terms and conditions, and to receive from the said E. F. the sum of \$——, the balance due upon said contract, as the purchase money, and to make, execute, and deliver a good and sufficient deed for all the right, title, and interest of all the defendant heirs at law of the said C. D., deceased, in and to the premises described in the petition, to the said purchaser, E. F., and that said plaintiff pay the costs of this proceeding, taxed at \$——.

SALE OF PERSONAL PROPERTY.

(*R. S. Secs. 6074—6087.*)

No. 1415.

Entry Dispensing with Sale of Personal Property.

[*Caption.*]

It appearing to the court that by the terms of the last will and testament of the said C. D., deceased, that said testator expressed a desire therein that there should be no sale of his personal property, the court, for satisfactory reasons, does therefore order, in accordance therewith, that a sale of the personal property belonging to said estate, as requested in said will, be omitted and not made by said administrator.

NOTE.—*R. S. Sec. 6074.* This entry may be made in connection and at the close of the entry appointing administrator, or as a separate one.

No. 1416.

Entry of Subsequent Order that Personal Property be Sold Upon Motion of Creditor.

[*Caption.*]

This day came A. B., and filed a motion herein, representing to the court that he is interested in the estate of C. D., deceased, as a creditor thereof, and that it will be necessary to sell the personal property belonging to said estate for the payment of the debts due therefrom; and the court being fully advised sustains said motion, and orders

that A., B., and C. be and they are hereby appointed to appraise the said property belonging to said estate; and —, the administrator of said estate, is hereby required to return said appraisement to this court without delay, and that he thereafter proceed to sell said personal property, according to law.

R. S. Sec. 6075.

No. 1417.

Entry ordering Private Sale of Personal Property at its Appraised Value.

[*Caption.*]

This cause coming on to be heard upon the motion of A., administrator of the estate of B., deceased, for an order authorizing him to sell the personal property belonging to said estate at private sale; and it having been made to appear to the satisfaction of the court from the affidavits of — [*names of persons*], that it is for the best interest of the estate to sell said property at private sale, it is therefore ordered and adjudged that said administrator proceed to sell said property at private sale at not less than its appraised value upon the following terms, to wit: [*state terms.*] The said administrator is ordered to make due return of his proceedings hereunder.

R. S. Sec. 6076.

No. 1418.

Entry ordering Private Sale of Personal Property at less than Appraised Value.

[*Caption.*]

Upon motion of A. B., administrator of the estate of C. D., deceased, and it appearing to the court from the affidavits of [*at least three disinterested persons, naming them*] that said property can not be sold at its appraised value, and that it will be for the best interest of the estate to sell the same at a less price, it is therefore ordered that said A. B., as such administrator, be and he is hereby authorized to sell said property at private sale at less than its appraised value, and that he make due report of his proceedings hereunder.

NOTE.—R. S. Sec. 6076.

No. 1419.**Entry ordering Sale of Personal Property at Public Sale upon Failure to Sell under Order of Private Sale.**

[*Caption.*]

Upon motion, and it appearing to the court that A. B., administrator of the estate of C. D., deceased, has been unable to sell the personal property belonging to said estate under the order of private sale hereinbefore made, it is now therefore ordered that said administrator proceed to sell the same at public sale in the same manner as though a private sale had not been ordered.

NOTE.—R. S. Sec. 6076.

No. 1420.**Entry Requiring Return of Sale Bill.**

Use same entries as in *ante* Nos. 1400, 1401, as to return of inventory. R. S. Sec. 6087, 6040.

No. 1421.**Entry Approving Sale of Personal Property.**

[*Caption.*]

This day came A., administrator of the estate of C., deceased, and made return of the order to sell the personal property belonging to said estate at public (*or*, private) sale.

And the court having carefully examined said report, and finding the same in all respects correct, and that said proceedings of said administrator have been regular and in conformity to law, the same are hereby approved and confirmed.

SALE OR DISPOSAL OF DESPERATE CLAIMS AND STOCKS.

(R. S. Secs. 6077—6080.)

No. 1422.

Entry ordering Claim to be filed in Court for benefit of Heirs, etc.

[Caption.]

Satisfactory proof having been produced to the court by A., administrator of the estate of C., deceased, that a certain claim belonging to said estate due from one E. F. is desperate and difficult of collection for the reason that [*here state the ground mentioned in the statute, 6077, under which it comes*], it is by the court ordered that said claim be filed in this court for the benefit of such heirs or creditors of the estate of said C., deceased, as may desire to sue for and recover the same.

NOTE.—R. S. Sec. 6077.

No. 1423.

Entry ordering Private Sale of Desperate Claims.

[Caption.]

This cause coming on to be heard upon the motion of A., administrator of the estate of C., deceased, for an order authorizing him to sell certain claims therein mentioned belonging to said estate in his hands to be administered, for the reason that the same are desperate and difficult of collection; and it appearing to the court that said claims exceed the sum of \$——, and that said administrator has given due notice according to law of his intention to apply to this court for an order to sell said claims, and that it is for the best interest of said estate that said order be made, * it is therefore ordered and adjudged that said administrator proceed to give public notice of the time and place of sale for three weeks previous to the day of sale, and that he proceed to sell the claims in his motion set forth at public auction according to law.

[Or, if made at private sale proceed from * above as follows:]

And it appearing to the court that the best interests of said estate will be subserved by a private sale of such debts and demands, it is therefore ordered that said administrator proceed to sell said claims in his motion set forth at private sale at not less than their appraised value for cash.

No. 1424.

Entry Ordering Sale of Stock or Shares in Corporations.

[*Caption.*]

This cause coming on to be heard on a motion of A. B., administrator of the estate of C. D., deceased, for an order authorizing him to sell certain shares of stock in the — company, a corporation, as therein set forth, and it appearing to the court that the best interest of said estate requires that said stock be sold at private sale, it is ordered that said administrator proceed to sell said shares of stock at private sale at not less than \$—— per share, upon the following terms [*state terms*], and he is ordered to make such transfers thereof to the purchaser as may be necessary.

NOTE.—R. S. Sec. 6080.

**ARBITRATION OF CLAIMS AGAINST
ESTATE.**

No. 1425.

Entry of Approval of Referees.

[*Caption.*]

This day came A., administrator of the estate of C. D., deceased, and represented to the court that he had entered into an agreement, in writing, with one E. F., to refer a controversy concerning the claim of the said E. F., against said estate, to G. H., I. J., and K. L., three disinterested persons as referees, for decision, said claim amounting to the sum of \$——, and asking the approval of this court.

It is therefore ordered that the acts of said administrator in this behalf be and the same are hereby approved.

NOTE.—R. S. Sec. 6093.

No. 1426.**Entry Referring Claim Exceeding \$100.00 to Referees.**

[*Caption.*]

A. B., administrator of the estate of C. D., deceased, having filed herein a certain agreement of reference made by him with one E. F., who holds a claim against said estate, the amount of which exceeds \$100.00, it is ordered by the court that said cause be docketed and that the matter in controversy, with respect to said claim, be and the same is hereby referred to —, —, and —, the referees named in said agreement, who are hereby ordered to proceed to hear and determine the matter, and make their report thereon to this court without unnecessary delay.

NOTE.—R. S. Sec. 6095.

No. 1427.**Entry Setting Aside Report of Referees.**

[*Caption.*]

This day this cause came on to be heard upon the motion of — to set aside the report of the referees, to whom the claim of E. F. against the estate of C. D., deceased, was referred by agreement of parties, and was argued by counsel and submitted to the court. Upon consideration thereof the court does sustain said motion, and orders that said report be and the same is hereby set aside, and that said controversy concerning said claim be referred to —, —, and —, upon the terms and conditions designated in the agreement heretofore made by the parties, and the said referees are directed to make report to this court without delay.

R. S. Sec. 6096.

No. 1428.**Entry Confirming Report of Referees and Judgment thereon.**

[*Caption.*]

This cause came on to be heard on the report of the referees, to whom the controversy concerning the claim of C. against the estate of D., deceased, was heretofore referred by agreement of parties, and upon the motion to confirm the same was argued by counsel and submitted to the court.

On consideration whereof, and it appearing to the court that the said report is in all respects in conformity to the agreement so made by said parties, and that their proceedings have been in all respects regular and in conformity to law, and that they have awarded to the said — upon his claim against the estate of said —, deceased, the sum of \$—, the said report is hereby approved and confirmed, whereupon it is ordered and adjudged by the court that the said — recover from the said —, as administrator of the estate of said —, deceased, the said sum of \$—, so as aforesaid awarded to him, together with his costs herein expended, taxed at \$—, for which execution is awarded.

NOTE.—R. S. Sec. 6096, which as amended makes the judgment of the probate court as valid and effectual in all respects as in other cases. The amendment authorizes judgment by the probate court, which under theretofore judgment had to be rendered in the common pleas court

REQUISITION TO REJECT CLAIM.

No. 1429.

Entry requiring Administrator to reject Claim at instance of Heir or Creditor.

[*Caption.*]

This day came —, (heir) *or* (creditor) of A. B., deceased, and filed herein a written requisition requiring C. D., as administrator of said estate, to disallow and reject a certain claim made by one E. F., and presented to said administrator for allowance, and filed therewith a certain undertaking in the sum of \$—, with sureties, which is approved by the court.

It is therefore by the court ordered that —, said administrator of said estate, be and he hereby is ordered and directed to disallow said claim. And that notice hereof shall issue to said administrator requiring him to notify said claimant that his claim is rejected and disallowed.

NOTE.—R. S. Sec. 6098.

ALLOWANCE OF ADMINISTRATOR'S OR EXECUTOR'S CLAIMS.

No. 1430.

Entry of Presentation of Administrator's Claim and hearing set.

[*Caption.*]

This day came E. F., administrator of the estate of G. H., deceased, and presented to this court his claim against said estate, amounting to the sum of \$—— for allowance.

It is ordered that the same be set for hearing on the —— day of ——, 18——, at — o'clock —— M., and that an order forthwith issue, directed to said administrator, requiring him to give notice thereof in writing to all the heirs, legatees, devisees, or creditors of said decedent interested in said estate according to law.

NOTE.—R. S. Sec. 6100.

No. 1431.

Entry of Hearing and Allowance of Claim.

[*Caption.*]

This cause coming on to be heard upon the claim of ——, administrator against the estate of C. D., deceased, heretofore presented to this court for allowance, and it appearing to the court that due and proper notice of the hearing hereof has been given to all persons interested as required by a former order of this court, and the court having heard all of the proof adduced and the arguments of counsel, upon due consideration thereof does find that said claim is a just and valid one against said estate, and does therefore allow the same against said estate in the sum of \$——, to which finding and decision —— by his counsel excepts.

NOTE.—R. S. Sec. 6101. Either an appeal or error may be prosecuted.

EXECUTION AGAINST ADMINISTRATOR OR EXECUTOR.

No. 1432.

Entry Authorizing Execution Against Administrator.

[*Caption.*]

This cause coming on to be heard upon the motion of — for an order authorizing an execution to be issued against — as administrator of the estate of —, deceased, on a certain judgment obtained in the court of common pleas of this county for the sum of \$—, on due consideration thereof said motion is allowed, and said execution, as therein prayed for, is allowed to issue against said administrator.

NOTE.—R. S. Sec. 6105.

CLAIMS NOT DUE FOR FOUR YEARS AFTER BOND.

No. 1433.

Entry Ordering Payment of Claim which does not become Due within Four Years after Administration.

[*Caption.*]

This day came A. B., a creditor of the estate of C. D., deceased, and presented to the court a claim, which he holds against said estate, but which does not become due and payable until the — day of —, 18—, within four years after the date of the said administrator's bond. * And the court, upon examination thereof, and it appearing that the same is justly due from said estate, and by consent of said A. B., and —, administrator of said estate, it is ordered that said claim be paid by said administrator out of the funds belonging to said estate, in like manner as if due, to wit, the sum

of \$——, the present value of said claim, which is to be in full thereof.

[*Or the order may be to require the administrator to retain in his hands sufficient money to satisfy the claim when it shall become payable.*]

NOTE.—R. S. Sec. 6115.

No. 1434.

Entry where Heir Files Bond.

[*Caption.*]

[*Proceeding from *, in ante No. 1433.*]

And thereupon came L. M., one of the heirs at law of said decedent [*or other person interested may do so*], and offered to give a bond to said creditor, with sufficient surety, for the payment of said demand when it became payable; and it appearing that said claim is justly due from the estate, orders that said bond be taken by the said ——, and that the said administrator be released from payment of said claim. And thereupon said —— filed said bond in the sum of \$——, with —— and —— as sureties, which bond is approved by the court.

NOTE.—R. S. Sec. 6115.

DISTRIBUTION WITHIN FOUR YEARS.

No. 1435.

Entry Ordering Distribution to Heirs upon their Giving Bond.

[*Caption.*]

It having been made to appear that A. B. and C. D., next of kin of E. F., deceased, have required G. H., administrator of the estate of I. J., deceased, to make payment of their distributive shares of said estate, it is, upon motion of said administrator, by the court ordered that he be authorized and empowered, upon the execution by said distributees of a bond in the sum of \$——, with sureties to the approval of the court, conditioned to refund any amount paid to them as may be necessary to satisfy demands that may afterwards be recovered against the estate of the deceased, and to indem-

nify the said administrator against any loss accruing by reason of such payment, to pay each of said distributees the — part of said estate upon their distributive shares thereof.

NOTE.—R. S. Sec. 6128.

ACTION FOR WRONGFUL DEATH.

No. 1436.

Entry Authorizing Administrator to Compromise Action for wrongful Death.

[Caption.]

This day came A. B., administrator of the estate of C. D., deceased, and represented to the court that he has a suit pending in the court of common pleas of said county, as such administrator, against the — company for the recovery of damages for the wrongful death of said deceased, alleged to have been caused by said — company, and that said — company has made an offer to compromise and settle said claim for damages by paying to said administrator the sum of \$—, and now moves the court to authorize him to accept said sum, and to compromise and settle said claim therefor.

On consideration thereof, and the court believing from the statements and representations made by said administrator that the proposed settlement is for the best interests of said estate, it is therefore by the court ordered that said administrator be and he is hereby fully empowered and authorized to compromise and settle said claim for damages and the action therefor by receiving from said — company the said sum of \$—, in full satisfaction of said claim against said company for damages.

R. S. Sec. 6135.

No. 1437.

Entry apportioning Money for Recovery in Wrongful Death.

[Caption.]

(This entry should properly be made in connection and at the close of the entry allowing the account filed by the administrator, after it has been determined what amount of money there is to distribute and apportion to the widow and heirs after deducting all expenses.)

And thereupon this cause coming on further to be heard upon the motion of said administrator for an order apportioning among the beneficiaries the amount remaining in his hands, being the amount recovered by him as such administrator, in an action for the wrongful death of said deceased, and it appearing that the widow and heirs of said decedent have not made any division of said funds among themselves, and the court being fully advised, finds the following to be the fair and equitable division and apportionment of said funds among the beneficiaries, to wit: to —, the widow, the sum of \$—; to —, one of the heirs, the sum of \$— (*and so on*). It is therefore by the court ordered that said sum be so apportioned and paid to said widow and heirs by said administrator in accordance with this order, and that he make due report of said distribution to this court.

NOTE.—R. S. Sec. 6135. The division of such fund is to be made by the court with reference to the age and condition of the beneficiaries and the laws of descent and distribution of personal estates. The Supreme Court has recently held that in such cases the jury should return a verdict for a gross sum, which should be distributed among the beneficiaries not found guilty of contributory negligence, that no damages should be awarded to them, and that the jury should find which, if any, of the beneficiaries were negligent. *Wolf, Admr., v. Ry. Co.*, 37 W. L. B. 23; 54 O. S.

SALE OF REAL ESTATE TO PAY DEBTS.

No. 1438.

Entry of Filing of Petition.

[*Caption.*]

This day came A. B., administrator of the estate of C. D., deceased, and filed herein his petition as such administrator, asking for the sale of certain real estate belonging to said estate in the petition described, to pay the debts of said estate.

It is therefore ordered that due notice be given of the filing of said petition and of the time set for the hearing thereof, according to law, and that the same be set for hearing on the — day of —, 18—.

NOTE.—R. S. Secs. 6137, 6142, 6143.

No. 1439.**As to Parties.**

(See that heading, *ante* page 507.)

No. 1440.**As to Service of Process.**

(See *ante* heading, page 515.)

No. 1441.**Entry of appointment of Guardian ad litem.**

[*Caption.*]

This day this cause came on to be heard upon the petition of A. B., administrator of the estate of C. D., deceased, for the sale of real estate to pay debts, and the motion of said administrator for the appointment of a guardian *ad litem* of E. F. and G. H., minor defendants and heirs of said decedent. And it appearing that the prayer of the petition is contested, and that said E. F. and G. H., said minor defendants, have been duly and legally served with process herein, the court does therefore appoint L. M. guardian *ad litem* for said minor defendants, who thereupon appeared in open court and accepted said appointment.

NOTE.—R. S. Sec. 6144. The statute provides that an appointment of a guardian *ad litem* need not be made unless the prayer of the petition for sale is contested, but it is the universal practice in some places to have an appointment made in every case, whether contested or not. It does not do any harm, and although not essential it may be a matter of choice.

No. 1442.**Entry of the Giving of Bond by Persons Interested to Prevent Sale.**

[*Caption.*]

This cause coming on this day to be considered upon the petition filed by L. M., administrator of O. P., deceased, asking for the sale of real estate for the payment of the debts of said estate, and it appearing to the court that C. D. [*and others interested in the estate*] have given a bond in the sum

of \$—— to said administrator, conditioned according to law, that said heirs will pay all the debts of said estate mentioned in the petition, or that shall be eventually found due from said estate, together with the charges of administering the same, and the allowance of the widow, so far as the personal estate of said decedent shall be sufficient for that purpose. It is by the court ordered that said bond be and the same is hereby approved and confirmed, and the said petition herein is dismissed.

NOTE.—R. S. Sec. 6146.

No. 1443.

Entry Ordering Sale when Appraisement made in Inventory.

[*Caption.*]

This cause coming on to be heard upon the petition heretofore filed herein by A. B., administrator of the estate of C. D., deceased, for the sale of real estate therein described, and it appearing to the court that all of the defendants and heirs at law of said deceased have been duly served with process herein, [*or*, have voluntarily entered their appearance herein], and that it is necessary to sell the real estate in said petition described for the payment of the debts due from said estate, and the costs of administering the same, and it appearing that an appraisement of said real estate has been heretofore made by the appraisers appointed to appraise the personal property of said estate, which was returned with the inventory and appraisement made of said estate, and approved by the court, it is therefore considered, ordered and adjudged by the court that said C. D., as such administrator, proceed to advertise and sell said real estate in the petition described, at public sale, at the door of the courthouse [*or*, upon the premises], at not less than two thirds of the appraised value thereof, upon the following terms, to wit: [*state terms*], and that due report of his proceedings hereunder be made without delay.

NOTE.—R. S. Secs. 6147, 6148, 6149. The entry may be changed to conform to an order for a sale of a part only of the real estate.

No. 1444.

Entry Ordering Appraisement and Assignment of Dower.

[Caption.]

This cause coming on to be heard upon the petition of A. B., administrator of the estate of C. D., deceased, for the sale of the real estate therein described for the payment of the debts of said estate, and the answer of the widow, and the court being satisfied that all of the defendants have been duly served with process [*or*, have voluntarily entered their appearance herein], and that it is necessary to sell the real estate in said petition described for the payment of the debts of said estate; and it appearing that S. D., widow(er) of C. D., deceased, has by her said answer asked to have her (his) dower in said premises assigned to her (him) by metes and bounds, it is therefore ordered that G. H., I. J. and K. L., three disinterested freeholders of said county, do, upon their oaths and actual view of said premises, assign and set off to said widow(er) out of the lands in said petition described, her (his) dower therein by metes and bounds, and that they appraise said premises subject to the dower of said widow(er), so by them assigned therein, at their true value in money, and that they make due return of their proceedings thereunder to this court.

NOTE.—R. S. Sec. 6155.

No. 1445.

Entry Ordering Appraisement and Sale Free from Dower.

[Caption.]

This day this cause coming on to be heard upon the petition of A. B., administrator of the estate of C. D., deceased, for the sale of the real estate therein described belonging to said estate, for the payment of the debts due therefrom, the answer of G. H., widow of said deceased, the answer of L. M., guardian *ad litem*, and the answer and cross petition of the defendant O. P.; and the court being fully advised in the premises finds that the defendants herein have been duly and legally served with process, or have voluntarily entered their appearance herein, and that it is necessary to sell the real estate in said petition described for the payment of the debts due from said estate, and the costs of administering the same; and it appearing from the answer of —, widow(er)

of said deceased, that she (he) waives the assignment to her (him) of her dower in said premises by metes and bounds, but that she (he) desires that the same may be sold free and clear of her (his) said dower, and that the same may be set off to her (him) in money out of the proceeds of the sale of said premises, it is therefore ordered and adjudged by the court that D. C., E. F., and I. J., three disinterested freeholders of the county, do, upon their oaths and actual view of said premises in the petition described, appraise the same at its true value in money, free from the dower of said —, widow(er) of said deceased; and it is further ordered that when said premises are so appraised that the said —, as administrator as aforesaid, do proceed, according to law, to advertise and sell said premises, at not less than two thirds of their appraised value, at the door of the courthouse (or upon the premises) upon the following terms, to wit: [*state terms*], and that due report of his proceedings hereunder be made forthwith without delay.

No. 1446.

Entry on Return of Appraisement Ordering Sale Subject to Dower, including Title of Heirs in Land Assigned to Widow.

[*Caption.*]

This day came B. A., administrator of the estate of D. C., deceased, and made return of the order of appraisement heretofore issued herein, of the real estate in the petition described; and the court having carefully examined said return, and finding that said appraisement and assignment of dower to the widow have been in all respects regularly made, the same are hereby approved and confirmed.

It is therefore ordered by the court that the said —, widow(er) of said deceased, have and hold for her (his) dower in said premises the land so assigned to her (him), as described in said order of appraisement, and that B. A., as such administrator aforesaid, do proceed to advertise and sell (*to*) said real estate, subject to the dower of the widow(er) of said deceased, but including the title of the heirs at law of said deceased in the premises so assigned and set off to the widow(er) for her (his) dower, at public sale upon the premises (or at the door of the courthouse), on the following terms, to wit: [*state terms*]; that the said administrator make due return of his proceedings hereunder to this court.

No. 1447.

Entry of Return of Appraisement where Dower Assigned in Rents and Profits, and Order of Sale.[*Caption.*]

This day came D. K., administrator of the estate of L. M., deceased, and produced his return of the order of appraisement heretofore issued herein; and the court having carefully examined the same, and finding it to be in all respects regular and legal, and that the dower of said widow(er) has been assigned to her (him) out of the rents and profits arising from said premises in the annual sum of \$——, the said proceedings and return are hereby approved and confirmed.

Whereupon it is ordered by the court that the said ——, widow(er) of said deceased, do have, hold, and reserve out of the rents and profits arising from said premises the sum of \$——, to be paid to her (him) annually out of said premises during the term of her (his) natural life; and said annual sum of \$—— is hereby made a charge upon said real estate. It is ordered by the court that the said D. K., as such administrator, do proceed to advertise and sell [*proceed as in ante form No. 1446, from (b)*].

No. 1448.

Entry ordering Additional Bond to be given.[*Caption.*]

This day it appearing to the court that the bond heretofore given by A. B., administrator of the estate of C. D., deceased, is insufficient in amount to secure said estate for the amount of money likely to come into the hands of said administrator arising from the sale of the real estate as petitioned for herein, it is ordered that said A. B. enter into an additional bond as such administrator in the sum of \$——, conditioned according to law, with sureties to the approval of the court.

No. 1449.**Entry of Hearing and ordering Appraisement—Answer of Widow
Waiving Dower—Answer of Guardian ad litem.**

[*Caption.*]

This cause came on to be heard upon the petition of the plaintiff, the waiver and consent of —, and the answer of L. B., widow of said decedent, G. H., waiving the assignment to her of her dower by metes and bounds and in rents and profits in the real estate in the petition described, and waiving any and all estates, titles and interests in said premises, the answer of the guardian for the suit of the defendants, H. B. and A. B., both minors over [*or*, under] the age of 14 years, and the exhibits and testimony, and was argued by counsel and submitted to the court.

Upon consideration whereof, and being fully advised in the premises, the court doth find that all the parties in interest have been properly and legally served with summons, or have waived the same and entered their appearance herein, and that all are properly before the court; that the facts stated in the petition are true as therein averred; that the sale of the premises therein described is necessary for the payment of the debts of said estate as in the petition averred; and the court doth now here order, adjudge and decree that the real estate in the petition described shall be appraised and sold according to law and the further orders of this court; and it is therefore now here by the court accordingly ordered that L. W., C. K., and J. B., three judicious, disinterested freeholders of the vicinity, be and they are hereby appointed to appraise said real estate upon actual view at its true value in money, and according to law, and free from dower, and that due return be made of their proceedings without delay.

No. 1450.**Entry Ordering Assignment of Homestead and Dower and
Appraisement.**

[*Caption.*]

This cause coming on to be heard upon the petition of —, administrator of the estate of —, deceased, and the answer of —, widow of said deceased; and the court finding that all of the parties have been duly served with process

herein, or have voluntarily entered their appearance herein, and that it is necessary to sell the premises in said petition described for the payment of the charges of administration and the debts due from said estate as prayed for in said petition; and it appearing to the court from the answer of —, widow, that the said deceased left a family homestead, and the said widow having by her answer asked to have a homestead set off to her, and also to have her dower in said premises in the petition described assigned to her by metes and bounds, and the court finding that said widow is entitled to such homestead and dower, it is ordered and adjudged that —, —, and —, three judicious, disinterested freeholders of the vicinity, after having been duly sworn, do proceed upon actual view of said premises to set off and assign such homestead to said widow not exceeding in value the sum of one thousand dollars (\$1,000); and that said appraisers do further proceed to assign and set off to said widow as her dower in said premises in the petition described by metes and bounds, the one equal one-third part of the lands in said petition described, and that they further appraise the said premises subject to such homestead and dower, and that due return be made of their proceedings to this court.

NOTE.—R. S. Secs. 6155, 5437, 5438.

No. 1451.

Entry Approving Assignment of Homestead and Dower and Appraisement, and Ordering Sale.

[Caption.]

This day came —, administrator of the estate of —, deceased, and produced to the court his return of the order for the assignment of a homestead and dower to —, widow, and the appraisement of the premises subject thereto; and the court having carefully examined said return and finding the same to be in all respects regular and legal, does therefore approve and confirm the same.

It is therefore ordered that the said —, widow, do have and hold said premises so assigned to her as her homestead and dower in said premises for and during her natural life.

It is further ordered that said administrator proceed to advertise and sell said premises [*proceed with usual order of sale as in No. 1446.*]

No. 1452.**Entry Ordering Assignment of Homestead to Minor Child—
Appraisement and Sale.**

[*Caption.*]

This cause coming on to be heard upon the petition of —, administrator of the estate of —, deceased, and the answer of —, guardian of —, a minor child of said deceased.

And the court being fully advised, finds that all of the defendants herein have been duly and legally served with process, and that it is necessary to sell the premises in the petition described for the payment of the debts and charges of administration of said estate. And it appearing from the answer of —, as guardian of —, a minor child of said decedent, that said decedent left a family homestead, and that said —, minor as aforesaid, is entitled to have the same set off and assigned to him, it is therefore by the court ordered and adjudged that —, —, and —, three judicious and disinterested freeholders of the vicinity, do upon their oaths and actual view of said premises proceed to set off to said minor child by metes and bounds a homestead in the premises in the petition described not exceeding one thousand dollars (\$1,000) in value, and that they proceed to appraise said premises subject to such homestead according to law, and that due return be made of their proceedings thereunder.

NOTE.—R. S. Sec. 6155. There is no provision designating how the claim of a minor entitled to the assignment of a homestead shall be brought to the attention of the court, but the above entry assumes that it may be done by an answer of a guardian.

No. 1453.**Entry Approving Assignment of a Homestead to Minor and
Appraisement and Ordering Sale.**

[*Caption.*]

This day came —, administrator of —, deceased, and produced a return of the order of appraisement heretofore issued herein; and the court having carefully examined the same, and it appearing that the appraisers have assigned and set off to —, minor child of said decedent, a homestead as in said return described, and that the proceedings of said appraisers have been in all respects regular and legal, the same are hereby approved and confirmed.

It is therefore ordered that the said —, as such minor child of said deceased, do have, hold, possess and enjoy the homestead so assigned to him by said appraisers, and in said return described, as long as he shall remain thereon and occupy the same as a homestead until he arrives at the age of majority.

It is further ordered by the court that —, as such administrator of such estate, do proceed to advertise and sell said premises in the petition described, subject to the homestead so assigned to —, minor child aforesaid, at public sale, etc.

No. 1454.

**Entry ordering Appraisement and Sale when no Widow or
Minor Child.**

[*Caption.*]

This day this cause came on to be heard on the petition of —, administrator of the estate of —, deceased, for the sale of the real estate therein described for the payment of the charges of administration and debts due from said estate, and the court being satisfied that due notice according to law has been given to all the heirs and persons interested in said estate finds that it is necessary to sell the real estate in said petition described for the payment of the debts of said estate and the charges of administration.

It is therefore ordered that —, —, and —, three disinterested and judicious freeholders of the vicinity, do upon their oaths and actual view make an appraisement of said premises of their true value in money, and that when said premises are so appraised the said —, as such administrator, proceed to advertise and sell said premises according to law at not less than two thirds of the appraised value upon the premises, upon the following terms, to wit: one third cash in hand, one third in six months, and one third in twelve months from the date of sale, said deferred payments to bear interest and be secured by a mortgage upon the premises sold, and that due report be made to this court of the proceedings hereunder.

No. 1455.

Entry appointing Appraiser to fill Vacancy.

[Caption.]

Upon motion of —, administrator of the estate of —, deceased, and it appearing that —, heretofore appointed as an appraiser, is unable to discharge his duties, it is ordered by the court that M. D., a judicious and disinterested freeholder of the vicinity, be and he is hereby appointed as an appraiser under the former orders of this court.

R. S. Sec. 6156.

No. 1456.

Entry setting aside Appraisement and ordering New One and Sale.

[Caption.]

D. C., administrator of the estate of L. M., this day produced to the court his return of the order of (appraisement) (and sale) heretofore issued herein, and the court upon the examination thereof finds that said administrator has twice offered the premises therein described for sale, and that the same were not sold for want of bidders.

It is therefore considered, ordered, and adjudged by the court that the appraisement heretofore made of said appraisement be and the same hereby are set aside and held for naught; and it is further ordered that —, —, and —, three judicious and disinterested freeholders of the vicinity, do upon their oaths and actual view of said premises make an appraisement thereof (free of the dower of —, widow, or, subject to the dower of —, widow), and that when said premises shall have been so appraised the said —, as such administrator, do proceed according to law to advertise and sell said premises at the door of the courthouse (or, on the premises) at not less than two thirds of their appraised value, upon the following terms, to wit: (and upon motion, and good cause being shown therefor, German publication of notice is hereby dispensed with).

R. S. Sec. 6160.

No. 1457.**Entry ordering Sale for certain Amount after being twice Offered.**[*Caption.*]

This cause coming on to be heard upon the report of —, administrator of the estate of —, deceased, and it appearing therefrom that said premises have been twice offered for sale, it is therefore upon motion ordered by the court that —, as such administrator of said estate, do proceed to sell said real estate for the sum of \$—, and report his proceedings to this court.

R. S. Sec. 6160.

No. 1458.**Entry ordering Private Sale.**[*Caption.*]

[*Proceed as in other forms Nos. 1443, 1445, 1446, down to this point, adjusting entry to circumstances.*]

And this cause coming on further to be heard upon the motion of said administrator for an order authorizing him to sell said premises at private sale, and it having been satisfactorily made to appear to the court that it will be more for the interest of said estate to sell said real estate at private sale, it is therefore ordered and adjudged by the court that the said —, as such administrator, proceed to sell said premises in the petition described (subject to dower, *or*, free of dower), according to law, at private sale, at not less than their appraised value, upon the following terms, to wit: [*state terms*], and that due report be made of his proceedings hereunder.

R. S. Sec. —.

No. 1459.**Entry confirming Sale—Ordinary Short Form.**[*Caption.*]

This cause coming on to be heard upon the return made this day by —, as administrator of the estate of —, deceased, of the order for the sale of the premises therein described, and upon his motion to confirm the sale therein reported to have been made. And the court having carefully

examined said return, and finding that said sale has been in all respects legally made, the same is hereby approved and confirmed; and it is ordered that said —, as such administrator, do make, execute, and deliver to —, the purchaser of said premises, a good and sufficient deed of conveyance therefor.*

It is further ordered that said administrator, out of the funds in his hands arising from said sale, pay,

First: The costs of this action, taxed at \$—, and a counsel fee of the sum of \$— to —, and that he apply the balance of said funds towards the payment of the debts due from said estate according to law and the further orders of this court.

No. 1460.

Entry confirming Sale and Finding Amount due Widow as her Dower in Money.

[Caption.]

[Proceed from * in ante Form No. 1459.]

This cause coming on further to be heard upon the answer of —, widow, and it appearing therefrom that she has elected to receive in lieu of her dower its value in money out of the proceeds of the sale of said premises, which the court finds to be the sum of \$—.

It is therefore ordered that the said administrator, out of the funds in his hands arising from such sale, pay,

First: The costs of this action,

Second: To —, widow, the sum of \$—, the amount so found due her. [*Proceed further as circumstances require.*]

No. 1461.

Entry confirming Sale ordering Deferred Installments secured by Mortgage.

[Caption.]

[Proceed from * in ante Form No. 1459.]

It is further ordered that the said —, as such administrator, before delivering said deed to said —, purchaser, secure from such purchaser a mortgage for the balance of the purchase money due upon said premises.

It is further ordered by the court that the said administrator pay, out of the funds in his hands arising from the sale of said premises [*proceed with order of distribution as usual*].

No. 1462.

Entry of Confirmation of Sale and Finding upon Answer and Cross Petition of Lienholders.

[Caption.]

This day this cause came on to be heard upon the petition of —, as administrator of the estate of —, deceased, the answer and cross petition of —, and the return of —, as such administrator, of the order of sale heretofore issued herein; and the court having made a careful examination of said return, and finding that the sale of said premises therein reported to have been made to L. M. has in all respects been legally made, the same is hereby approved and confirmed, and the said administrator is ordered to make and deliver to said purchaser a good and sufficient deed for the premises so sold, and to take from such purchaser a mortgage upon the premises for the deferred payments.

And this cause coming on further to be considered upon the answer and cross petition of —, the court being fully advised finds that there is due the said —, upon the note therein set forth, from the estate of —, deceased, the sum of \$—, with interest thereon from the date of this entry; that the said —, deceased, during his lifetime, and —, his wife, to secure the payment of said promissory note, gave a mortgage upon the premises in the petition described, which is now a valid and subsisting lien upon said premises, and now upon the fund in the hands of said administrator arising from the sale of said premises. It is ordered that satisfaction of the mortgage set forth in the answer and cross petition of — be entered of record thereof in the office of the recorder of — county, Ohio.

It is therefore ordered that said —, as such administrator, out of the funds in his hands arising from the sale of said premises, pay,

First: To the treasurer of — county the taxes upon said premises,

Second: The costs of this action, including \$— as a counsel fee, to —,

Third: To the said — the sum of \$—, the amount found due him upon his answer and cross petition.

No. 1463.**Entry authorizing Administrator to accept Cash Offer from Purchaser after Sale.**

[*Caption.*]

This day came —, administrator of the estate of —, deceased, and represented to the court that L. M., who purchased the premises belonging to said estate heretofore sold by said administrator upon deferred payments, has offered to pay the full amount of the purchase money in cash, and moves the court for an order authorizing him to accept the same.

And the court deeming it for the best interests of the estate to accept said offer does hereby authorize and empower the said administrator to accept from said purchaser the sum of \$—, and that he proceed to distribute the same according to law and the former orders of this court.

R. S. Sec. 6162.

No. 1464.**Entry authorizing Sale of Purchase Notes.**

[*Caption.*]

This day came —, administrator of the estate of —, deceased, and moved the court for an order directing and authorizing him to sell the notes for the deferred payments taken by said administrator from the purchaser at the sale of the premises hereinbefore had and made in this action. And the court being fully advised, and deeming for the best interests of the said estate, does hereby direct and authorize said administrator to sell all of said notes so taken by him for the deferred payments without recourse, and at not less than their face value with accrued interest, and that said administrator proceed to distribute the proceeds arising therefrom according to law and the further order of this court.

R. S. Sec. 6162.

No. 1465.**Entry of Order of Appraisement and Sale of Equitable Interest in Real Estate.**

[*Caption.*]

This day this cause came on to be heard upon the petition filed herein by —, as administrator of the estate of —,

deceased, for the sale of a certain interest in the premises therein described, and it appearing to the court that all the parties defendant have been duly and legally served with process, and that said deceased was the owner of the equitable interest in said premises, as in the petition set forth and described, and that a sale thereof is necessary for the payment of the debts of said estate (and —, the widow of said deceased, having filed her answer herein, electing to receive her dower therein in money), it is by the court ordered that said interest of said decedent in said premises be appraised by the oaths of —, —, and —, at its value in money; and that when said appraisement is made the said administrator proceeded to sell said interest in said real estate in the petition described at private sale, at not less than the appraised value thereof, for cash [*or deferred payments as the case may be*], and that due report be made herein.

NOTE.—R. S. Sec. 6166. The proceedings under this section may be similar in form to the regular sales of real estate, and the former entries may be used.

No. 1466.

Entry setting aside Appraisement and Sale upon Motion of Heirs.

[*Caption.*]

This cause came on to be heard upon the motion of —, heirs at law of —, deceased, heretofore filed herein, to set aside the appraisement and sale of the premises made in this proceeding by —, administrator of such estate, the evidence and arguments of counsel, and was submitted to the court.

On consideration whereof the court finds that said motion is well taken, and therefore sustains the same, and orders that said appraisement and the said sale of said premises made by said administrator to — be and the same is hereby set aside and annulled.

It is further ordered that —, —, and —, three judicious and disinterested freeholders of this county, do, upon their oaths and actual view of the premises in the petition described, appraise the same at their true value in money (free from dower, *or*, subject to the dower) of —, widow of said deceased.

It is further ordered that when said premises shall have been so appraised that the said administrator proceed to advertise and sell the same [*as in ante Form No. 1456*].

No. 1467.

Entry making Lienholder Party Defendant.

[Caption.]

Upon motion of —, and it appearing that he claims some interest in the premises and petition described, he is hereby made a party defendant herein, with leave to file an answer and cross petition.

No. 1468.

Entry of Confirmation of Sale—Where Purchaser assumes Assessments.

[Caption.]

This day this cause came on to be heard upon the motion of A. B., petitioner herein, to confirm the sale made by him as administrator (*or*, executor) of the estate of C. D., deceased, made in obedience to the former order of this court, return of which sale has been made by the petitioner according to law and the order of the court.

Upon consideration whereof, and the court being fully advised in the premises, and being satisfied that such sale was legally and fairly made, and that the proceedings of the petitioner in that behalf have in all things been had in conformity with law and the order of the court, it is now here ordered, adjudged, and decreed that said sale be and the same is hereby approved, ratified, and confirmed; and it is further ordered that said administrator (*or*, executor) convey to the purchaser, H. N., by a good and sufficient deed in fee simple, free from the dower estate and any and all other rights, titles, interests of said widow, L. B., in said lands and tenements so to him sold, and in the petition and proceedings herein described (the same to be subject to and said purchaser to assume all liability and charges for the improvement of any and all streets abutting on said premises).

And the court coming now to distribute the proceeds arising from said sale, etc.

ACCOUNTS OF EXECUTORS AND ADMINISTRATORS.

(*R. S. Secs. 6175—6192.*)

No. 1469.

Entry of the Filing of Account.

[*Caption.*]

This day came A. B., administrator [*or*, executor] of the estate of C. D., deceased, and filed his — account as such administrator.

It is therefore ordered that said account be set for hearing on the — day of —, and that due notice, according to law, be given of the filing, and of the time set for the hearing thereof.

No. 1470.

Entry Confirming Partial Account.

(*Caption.*)

This cause coming on to be heard upon the — partial account of A. B., administrator [*or*, executor] of the estate of C. D., deceased, and due notice, according to law, having been given of the filing, and of the time set for the hearing of said account, and no exceptions having been filed thereto, and the court having carefully examined the same, and finding it in all respects regular and correct, the same is hereby approved and confirmed; and the court finds that there is a balance remaining in the hands of said administrator of the sum of \$——, which he is ordered to hold according to law.

No. 1471.

Entry of Filing of Exceptions to Account.

[*Caption.*]

This day came —, and filed exceptions to the first partial [*or, final*] account of C. D., administrator of the estate of E. F., deceased, heretofore filed herein. Whereupon the court orders that said exceptions and account be set for hearing on the — day of —, 18—.

—

No. 1472.

Entry Referring Account and Exceptions to Special Commissioner.

[*Caption.*]

Upon motion of —, and the court deeming it expedient and proper, does refer the first partial [*or, final*] account of A. B., administrator of the estate of C. D., deceased, and the exceptions filed thereto by E. F., to H. K., as special commissioner, to hear and determine the same, and report his findings to this court without unnecessary delay.

R. S. Sec. 6186.

—

No. 1473.

Entry of Hearing of Account and Exceptions Thereto—Allowing Account.

[*Caption.*]

This day this cause came on to be heard upon the final account of A. B., administrator [*or, executor*] of the will of the estate of C. D., deceased, and the exceptions filed thereto by —. And the court having heard the evidence adduced by the parties, and arguments of counsel, the same was submitted to the court. On consideration thereof the court finds that said exceptions to said account are not sustained, and therefore overrules the same.* And it appearing to the court that due notice, according to law, has been given of the filing, and of the time set for the hearing of said account, and having carefully examined the same, and finding it to be in all respects regular and correct, does therefore approve and confirm the same. And the court finds that there is a balance remaining in the hands of the said administrator [*or,*

executor], which he is ordered to distribute according to law (and the will), and make due report to this court. * *

No. 1474.

Same continued—Sustaining Exceptions.

[*Caption.*]

This day this cause came on to be heard upon the final account of R. S., (executor of the will, etc.) administrator of the estate of J. H., deceased, and the exceptions thereto, and the court having heard the evidence adduced by the parties, and being fully advised in the premises, finds that the first exception to said account as to the sum of \$—— is well taken, and it is ordered that the sum of \$—— of the first item of credit in the said account be disallowed and the balance of said item be allowed; that said second exception is overruled. [*Proceed from* *, *ante* No. 1473.]

No. 1475.

Entry Allowing Account of Distribution.

[*Caption.*]

This day this cause came on to be heard upon the account of distribution heretofore filed herein by A. B., administrator (*or*, executor) of the estate of C. D., deceased, and the court being satisfied that due notice according to law has been given of the filing and of the time set for the hearing of said account, and that the same is in all respects regular and correct, does therefore approve and confirm the same. And the court further finding that the said A. B., as such administrator, has paid over and distributed all of the money in his hands to the heirs of the said C. D., deceased, it is therefore ordered that the said A. B. be and he is hereby discharged and released as such administrator, and his sureties are hereby discharged from any further liability except for fraud or manifest error.

R. S. Sec. 6190.

No. 1476.

Entry Ordering Distribution of Notes in kind.

[Caption.]

[Proceeding from. **, in ante form No. 1473.]

And it also appearing that there is in the hands of said administrator certain notes belonging to said estate, and that the assent and agreement of the persons entitled to receive the same as distributees has been obtained by said administrator, it is further ordered that the said administrator be and he is hereby allowed to distribute said notes (bonds, stocks, claims or other rights in action) to said persons who are willing to receive the same.

R. S. Sec. 6189.

No. 1477.

Entry Authorizing Investment of Funds held Six Months.

[Caption.]

This day came A. B., administrator of the estate of C. D., deceased, and represented to the court that he has filed his final account as such administrator, and that he has been ordered to make distribution of the balance of the funds remaining in his hands belonging to said estate to the heirs of said decedent according to law; that he has paid over and distributed all of said funds except the share going to one E. F., an heir of said deceased, to wit, the sum of \$——, which has remained in his hands unclaimed for six months, and that he is unable to ascertain the whereabouts of said E. F., and asks for an order authorizing him to invest said sum as provided by law. It is therefore ordered by the court that said A. B., as such administrator, be and he is hereby empowered and authorized to invest said sum of \$—— in stocks (or, to loan the same upon mortgage security), for the benefit of the said E. F., said investment to be made in the name of F. C., judge of said court, and his successors in office, the same to be so held subject to the further orders of the court.

R. S. Sec. 6191.

No. 1478.**Entry Authorizing Money to be Paid Into County Treasury
when it can not be Loaned.**

[*Caption.*]

Upon motion of E. C., administrator of the estate of P. M., deceased, and it appearing that the said administrator has been unable to make a satisfactory loan of the funds now remaining in his hands and belonging to one E. F., an heir of the said decedent, whose whereabouts he is unable to ascertain, it is hereby ordered that the said administrator pay said sum of \$——, so held by him, into the treasury of the county, as provided by law, the same to be credited to the general fund.

R. S. Sec. 6161.

No. 1479.**Entry Ordering Sum Deposited for Heir to be Paid Over to
Him Upon Satisfactory Proof.**

[*Caption.*]

Now comes E. F., and represents to the court that he is an heir at law of C. D., deceased, and entitled to the sum of \$——, deposited by order of court by L. P., administrator of said estate, in the county treasury of said county, and the court being satisfied that the said E. F. is an heir at law of said decedent, and the person he represents himself to be, does order that the county auditor deliver to him a warrant for the sum of \$——, so as aforesaid deposited in the county treasury for his benefit.

R. S. Sec. 6192.

DISTRIBUTION ENFORCED.

(*R. S. Secs. 6195—6200.*)

No. 1480.

Entry of Filing of Petition to Compel Distribution—
Ordering Citation.

[*Caption.*]

This day came S. F., and filed herein his petition to compel G. J., administrator of the estate of N. L., deceased, to pay over and distribute to him, as an heir at law of said deceased, certain money therein alleged to be due him as his distributive share of said estate. It is therefore ordered that a citation issue against said administrator commanding him to appear before this court on the — day of —, 18—, at — o'clock — M., and show cause why judgment should not be rendered and execution awarded against him for the amount claimed by the petitioner.

R. S. Sec. 6195.

No. 1481.

Entry Ordering Service by Publication.

[*Caption.*]

It having been made to satisfactorily appear to the court that A. B., administrator of the estate of C. D., deceased, resides without the state, it is ordered that notice be given to him by publication according to law, and that said petition be set for hearing on the — day of —, 18—.

R. S. Sec. 6196.

No. 1482

Entry Ordering other Necessary Parties in.

[Caption.]

This cause coming on further to be considered upon the petition heretofore filed herein by S. F. to compel G. J., administrator of the estate of N. L., deceased, to make distribution as therein prayed for, and it having been made satisfactorily to appear to the court that in order to hear, determine and settle the rights and claims of all the parties interested therein, it will be necessary for that purpose to make other parties in interest parties to said petition, to wit: [*name them*], it is by the court ordered that said persons be and they are hereby made parties herein, and that plaintiff file an amended [*or, supplemental*] petition setting forth the nature of their relationship to said controversy, and that service of notice be given as required by law, and that said administrator [*or, executor*] appear on the — day of —, 18—, and show cause why judgment should not be rendered against him according to law.

R. S. Sec. 6198.

No. 1483.

Judgment Rendered upon Petition.

[Caption.]

This cause came on this day for hearing on the petition filed herein to compel distribution to be made by G. J., administrator [*or, executor*] of the estate of N. L., deceased, and it appearing that all the parties interested therein are properly before the court, and that said administrator [*or, executor*] has been duly notified hereof, said cause was submitted to the court. On consideration whereof the court finds that the facts alleged in said petition are true, and that said S. F. is entitled to have distribution made to him by said administrator as prayed for in said petition. It is therefore ordered that said S. F. do recover from G. J., as administrator [*or, executor*] of said estate, the sum of \$——, together with the costs of this proceeding, for which execution is awarded.

NOTE.—In many instances a special finding of the facts (briefly) might be made in the entry. R. S. Secs. 6197, 6198. This may be adapted to the common pleas court. R. S. Sec. 6200.

No. 1484.

Entry of Judgment upon Petition for Distribution Ordering Money paid to Attorney in Fact.

[*Caption.*]

This day came the parties by their attorneys and this cause came on to be heard upon the petition of the plaintiff, the answer of the defendant, the evidence, exhibits and testimony, was argued by counsel and submitted to the court. And the court being fully advised in the premises, having duly considered the same, doth find that the said R. M. died intestate, and that on the — day of —, 18—, the defendant was by this court duly appointed as administrator of the estate of said R. M., deceased; that on the — day of —, 18—, the defendant as such administrator filed his final account in this court for settlement, and that said account was by this court finally settled on the — day of —, 18—, and there was found to be due in the hands of the defendant of the money of said estate for distribution the sum of \$—. That the amount found due was all the proceeds of the personal property that ever came to the hands of said administrator, excepting, however, the amount so paid out for debts and expenses of administration, as shown by said account of said administrator, that the court by its judgment duly entered on said — day of —, 18—, ordered and directed the defendant to distribute the said amount so as aforesaid found due according to law. The court further finds that M. O., H. O., M. D. and M. S. are the sole surviving heirs at law and next of kin of the said R. M., deceased, and as such were entitled by law to and did inherit the personal property of said R. M., deceased, intestate, remaining after the payment of debts, and that said property descended to and did vest in said persons.

The court further finds that the plaintiff is the attorney in fact of said [*naming them*], and as such is entitled to receive their distributive shares of said intestate's estate.

It is therefore ordered and adjudged by the court that the defendant, as such administrator, pay the said sum so found due said estate, being the amount mentioned in the petition herein, less the costs, charges and taxes that have accrued since said settlement, to the said C. G. as attorney in fact for said persons, whose receipt shall be sufficient voucher for said payment, and upon said payment being made the defendant shall be forever discharged from his said trust as administrator of said estate.

No. 1485.**Entry Granting Motion to send Case to Common Pleas Court.**

[*Caption.*]

Upon motion of —, one of the parties to this proceeding, it is ordered that this cause be and the same is hereby reserved and sent to the court of common pleas of this county for trial and judgment.

R. S. Sec. 6199.

INSOLVENT ESTATES.

(*R. S. Sec. 6224.*)

No. 1486.**Entry Appointing Commissioners to Receive and Examine Claims of Creditors.**

[*Caption.*]

This day came A. B., administrator of the estate of C. D., deceased, and filed herein a motion, representing that the real and personal estate of said decedent will probably be insufficient for the payment of the debts of said estate, and asking the appointment of commissioners to receive and examine claims of creditors.

It is therefore ordered by the court that G. H. and L. M. be and they are hereby appointed commissioners to receive and examine all claims of creditors against the estate of said decedent, including those duly presented and allowed by said administrator, and any and all other claims which may be duly verified and presented to them, and that they return to this court a list of all the claims which may be thus presented to them, together with the sum which they shall allow on each claim.

It is further ordered that said commissioners appoint times and places at which they will receive and examine claims, and that they give notice thereof in writing according to law.

NOTE.—R. S. Secs. 6224, 6225.

No. 1487.**Entry Allowing Further Time to Creditors to Present Claims to Commissioners.**

[*Caption.*]

Upon motion, it is ordered by the court that the time within which the creditors of the estate of C. D., deceased, may have to present their claims to — and —, commissioners heretofore appointed herein, be extended for a period of —, from —.

NOTE.—R. S. Sec. 6226.

No. 1488.**Entry of Hearing upon Appeal from Commissioners to Court—Disallowing Claim.**

[*Caption.*]

This cause coming on to be heard upon the appeal of — from the commissioners' action in rejecting his claim against the estate of G. D., deceased, and the court having heard the evidence and arguments of counsel, was submitted to the court.

On consideration thereof the court finds that said claims of the said — against said estate ought not to be allowed, and does therefore order that the same be not allowed as a valid claim against said estate.

It is therefore ordered that said — pay the costs of this proceeding, taxed at \$—.

NOTE.—R. S. Sec. 6230.

No. 1489.**Entry of Filing of Petition to be allowed to Prosecute Appeal.**

[*Caption.*]

This day came E. F. and filed herein his petition asking that he be allowed to claim and prosecute an appeal from the commissioners of insolvency of the estate of C. D., deceased, heretofore appointed herein.

It is therefore ordered that said claimant give notice to A. B., administrator of said estate, and that the same be set for hearing on the — day of —, 18—.

R. S. Sec. 6231.

No. 1490.**Entry of Hearing upon Petition for Allowance of Appeal.**

[*Caption.*]

This day this cause came on to be heard upon the petition of —, heretofore filed herein, asking that he be allowed to prosecute an appeal from the action of the commissioners of insolvency of the estate of C. D., deceased, heretofore appointed herein. And it appearing that due notice of the filing and of the time set for hearing of said petition has been given to the administrator of said estate, and that said — failed (by accident, mistake, or otherwise), and not by his own neglect to prosecute his said appeal within the time allowed by law for that purpose, and that justice requires a further examination of his claim. It is therefore ordered that said —'s appeal to this court be allowed, and that the further hearing thereof be continued.

R. S. Sec. 6231.

No. 1491.**Entry of further Hearing of Appeal Allowing Claim.**

[*Caption.*]

This day this cause coming on to be further heard upon the appeal of — from the action of the commissioners of insolvency of the estate of C. D., deceased, and the court having heard the evidence adduced, and being satisfied that said claim is a just and valid one against said estate and ought to be paid, does therefore allow the same and order that A. B., administrator of said estate, pay said claim from the funds of said estate according to law.

R. S. Sec. 6232.

No. 1492.**Entry ordering Distribution in Accordance with Report of Commissioners.**

[*Caption.*]

This day this case coming on to be further considered upon the report of the commissioners of the estate of the said C. D., deceased, the court upon inspection finds therefrom that the claims which have been presented to said commis-

sioners and allowed by them as valid claims against said estate amount to the sum of \$—, and that the probable cost and expense of administration of said estate amount to the sum of \$—, and that there is in the hands of the administrator of said estate applicable to the payment of said indebtedness the sum of \$—, which will pay a dividend of — percent thereon. It is therefore ordered that the said administrator of said estate pay the remaining sum in his hands, amounting to \$—, by paying to each one of said creditors — percent of their claims, and that he make due report thereof to this court.

No. 1493.

Entry declaring Estate insolvent, authorizing Executor (or Administrator) to receive Claims.

[*Caption.*]

This day came A. B., administrator of the estate of C. D., deceased, and represented to the court that said estate will be probably insolvent, and the court not considering it necessary to appoint commissioners does therefore authorize, direct, and empower said administrator to receive and examine all claims of the creditors of said estate which may be presented to him as such administrator.

It is further ordered that said administrator give due notice according to law to the creditors of said estate of the insolvency thereof according to law.

R. S. Sec. 6236.

No. 1494.

Entry of Hearing of Exceptions to allowance of Claim by Administrator.

[*Caption.*]

This day this cause came on to be heard upon the exceptions heretofore filed to the allowance by A. B., administrator of C. D., deceased, and the court having heard the evidence produced, upon due consideration thereof finds that said claim is just and ought to be allowed and does therefore overrule said exceptions. (*Or, finds that said claim ought not to be allowed, and therefore sustains said exceptions.*)

R. S. Sec. 6244.

APPOINTMENT OF GUARDIAN.

(R. S. Secs. 6254—6265.)

No. 1495.

Entry of Appointment of Guardian.

[*Caption.*]

1. [*Where named in will.*]

This day came E. F., who was named in the last will and testament of A. D., deceased, as the guardian of the (person and estate) of R. D., a minor child of said decedent, and made application to be appointed as such guardian, and filed herein his statement of the probable value of all the property and estate of such minor, and it appearing to the court that said R. D. is a minor, is under the age of twelve years (*or, if over twelve years*, that said R. D. is of the age of fourteen years, and makes choice of said E. F. as his guardian.)

R. S. Sec. 6267.

2. [*Where minor makes choice.*]

This day came A. D., minor child of C. D., late of said county, deceased, over the age of twelve years, and made choice of T. E. as his guardian, which choice is approved by the court. And thereupon came the said T. E. and made application to be appointed guardian of the said A. D., and filed herein a sworn statement of all the property and assets of the said minor, and the probable value thereof, and it appearing that it is necessary to appoint a guardian of said minor, it is, etc.

3. [*Where minor is cited to make choice and fails so to do.*]

A. D., minor child of C. D., late of said county, deceased, having been heretofore cited by this court to appear on this day, and make choice of a guardian, and said minor having failed so to do, thereupon came T. E. and made application to be appointed as guardian of the (person and) estate of the said A. D., and filed a sworn statement of the probable value of the whole estate of said minor, and the court being satisfied

that the said A. D. is a minor of the age of — years, and that he is a resident of this county, and that it is necessary to appoint a guardian of the (person and) estate of said minor, and the court deeming the said T. E. a suitable person to be appointed as such guardian, it is therefore ordered by the court that the said T. E. be and he is hereby appointed as guardian of the (person and) estate of the said A. D., and that he enter into a good and sufficient bond as such guardian in the sum of — dollars, with sureties to be approved by this court, and conditioned according to law. And the said T. E. thereupon accepted said appointment, (a) and filed herein his bond as such guardian in the sum of — dollars, conditioned according to law, with — and — as sureties, which bond is hereby approved by the court and ordered recorded. It is further ordered that the letters of guardianship issue to the said T. E., and that he return an inventory of the property and estate of said minor according to law.

R. S. Secs. 6254-6261.

No. 1496.

Recital in Entry where Mortgage is given in Lieu of Bond.

[*Caption.*]

[*Continuing from (a) in ante Form No. 1495.*]

And the said —, in lieu of a bond, produced to the court a mortgage upon good and unincumbered land, executed to said —, together with affidavits showing the value thereof, and an abstract of the title to said lands, and it appearing to the court that the said lands, exclusive of all improvements thereon, are sufficient security for said bond, the same is hereby approved by the court. [*Then follow as in ante No. 1495.*]

No. 1497.

Filing of Exceptions to Bond.

[*Caption.*]

This day came —, and filed exceptions to the bond of —, as guardian of the said —, a minor, for the reasons stated therein. It was thereupon ordered that not less than — days' notice be given to the said —, to appear and show cause against the allowance of said exceptions, and that the same be set for hearing on the —, 18—.

R. S. Sec. 6261.

No. 1498.**Hearing of Exceptions.**

[*Caption.*]

This cause coming on to be heard upon the exceptions heretofore filed herein by —, to the bond given herein by —, as guardian of —, a minor, and the court having heard all the evidence adduced by the parties, finds that said exceptions are not well taken, and therefore overrules the same. (*Or*, and finds said exceptions well taken, and therefore sustains the same. It is therefore ordered that the said —, as such guardian, enter into an additional bond in the sum of \$—, with sureties according to law on or before —, 18—.)

R. S. Sec. 6261.

No. 1499.**Recital in Entry of Dispensing with Bond by Will.**

[*Caption.*]

And the said testator, —, having expressed a desire in his said will that the said A. B. be not required to give a bond as such guardian, the court for good reasons therefore dispenses with the same, and the said — is not now required to give bond.

R. S. Sec. 6268.

**REMOVAL AND RESIGNATION OF
GUARDIAN.****No. 1500.****Entry of Filing of Motion for Removal of Guardian.**

[*Caption.*]

This day came —, and filed a motion for the removal of — as guardian of —, a minor. It is ordered that proper notice be given said —, and that the said motion be set for hearing on —, 18—.

No. 1501.

Entry removing Guardian.

[Caption.]

This cause coming on to be heard upon the motion of —, heretofore filed herein, to remove —, as guardian of the said —, and the court having heard all the evidence adduced by the parties, and being fully advised in the premises, finds that the said motion is well taken, in this, to wit, [*state grounds on which sustained.*]

It is therefore ordered by the court that the said — be and he is hereby removed as guardian of the said —, and his powers and letters of guardianship revoked. It is further ordered that the said — file his final account as such guardian on or before —, 18—.

[*Or, if not sustained.*] And the court finds that the said motion is now well taken, and therefore overrules the same, and orders and adjudges that the said — pay the costs hereof to be taxed.

R. S. Sec. 6272.

No. 1502.

Entry of Filing of Request of Surety to be Released.

[Caption.]

This day came —, one of the sureties on the bond of —, guardian of —, a minor, and filed herein his written request to be released as surety of the bond of said —, as such guardian. It is ordered that the same be assigned for hearing on the —, 18—, and that said — give notice to the guardian as required by law.

R. S. Sec. 6273.

No. 1503.

Entry releasing Surety.

[Caption.]

This day this cause came on for hearing on the application and request of — to be released as surety on the bond of —, as guardian of —; and it appearing that due notice according to law has been given to said guardian of the filing of said request and of the time set for the hearing thereof,

and there appearing good and sufficient reasons for releasing said —, it is ordered that the said — enter into a new bond as such guardian on or before —, 18—, in the sum of \$—, with sureties to be approved by the court and conditioned according to law.

R. S. Sec. 6273.

No. 1504.

Entry of Filing New Bond and Releasing Surety.

[*Caption.*]

This day came —, guardian of —, a minor, and filed a new bond as such guardian, in obedience to an order heretofore made herein, in the sum of \$—, conditioned according to law, with — and — as sureties, which bond the court approves, and orders that the same be recorded in the record of bonds of said court.

It is therefore ordered that the request of —, surety on the former bond of said —, as such guardian, to be released therefrom, be and the same is hereby granted, and the said — is hereby released from further obligation on the bond of the said —, as such guardian.

R. S. Sec. 6273.

No. 1505.

Entry of Removal of Guardian where he Fails to Give a New Bond.

[*Caption.*]

This being the day within which the said —, guardian of —, a minor, was required by a former order of this court to enter into a new bond in the sum of \$—, by reason of the request of —, one of the sureties, to be released upon his bond as such guardian, and the said — having failed to file such new bond, and still failing so to do, it is ordered that he be and he is hereby removed as such guardian, and his letters of guardianship revoked.

No. 1506.

Guardian removed when Ward removes to another State.

[*Caption.*]

This cause came on to be heard by the court upon the application heretofore filed herein by —, who was appointed

guardian of —, a minor, by the — court of —, for the removal of —, guardian of the said —, appointed in this state and county. And it appearing that due notice according to law has been given to the said —, guardian as aforesaid in this state, of the filing and of the time set for the hearing of this application, and that the said minor — has removed from this county and state to —, and it appearing from the exemplification of the record of the appointment of the said — made in said state of —, that he is the duly appointed and qualified guardian of said minor in said state, and that said exemplification of said record is in due form of law as required by the act of Congress made and provided, and that the said state of — has enacted a similar provision as to wards removing from said state of —, as in Ohio, and that the removal of said ward from this state was for his best interest, it is therefore ordered by the court that the said — be and he is removed as guardian of said —, and his letters of guardianship terminated and revoked; and he is ordered to render his accounts as such guardian in this court.

No. 1507.

Entry of Filing of Account by such Resident Guardian, and Authorizing him to Pay to Foreign Guardian.

[*Caption.*]

This day this cause came on to be heard upon the final account of —, guardian of —, a minor, and due notice according to law having been given of the filing and of the time set for the hearing of said account, and no exceptions having been filed thereto, and the court having carefully examined said account, and finding the same to be in all respects regular and correct, the same is hereby approved and confirmed; and the court finds that there is a balance in the hands of said —, as such guardian, the sum of \$—.

And thereupon this matter came on to be heard upon the application of —, who was appointed guardian of said —, who has removed to the state of —, and the court having heretofore examined and approved the exemplification of the record of appointment of said —, as guardian of said —, minor, the said —, as such foreign guardian is now here permitted to receive the sum of \$—, now in the hands of the said —, as guardian in this state, and due the said —, minor, and the said — is hereby ordered to pay and turn over to the said foreign guardian the said sum of \$—.

SALE OF REAL ESTATE BY GUARDIAN.

(*R. S. Secs. 6281—6287.*)

No. 1508.

Entry of Filing of Petition, and ordering Notice.

[*Caption.*]

This day came —, guardian of —, a minor, and filed a petition duly verified, asking for the sale of the real estate therein described belonging to his said ward. It is therefore ordered by the court that the said guardian cause — days' notice of the filing of his said petition, and of the time set for the hearing thereof, to his said ward in the manner and form in which service of process is made upon minors according to law, and to [*here give names of other defendants*], and that said petition be set for hearing on the — day of —, 18—.

R. S. Sec. 6282.

No. 1509.

Entry of Hearing of Petition, Order to Appraise, and Sale in One.

[*Caption.*]

This day this cause came on for hearing upon the petition of —, as guardian of —, a minor, for the sale of the real estate therein described belonging to said minor, and it appearing to the court that notice according to law and the order of this court has been given hereof to said minor, and to the defendants hereto, and that, as alleged in said petition, it is necessary to sell said real estate of said minor for the payment of debts due from him [*or for any of the reasons provided in statute*], * it is therefore ordered by the court that said premises be appraised by the oaths of —, —, and —, three freeholders of the county who are not of kin to the petitioner, (a) and that when said premises are so appraised, that the said —, as such guardian, proceed to advertise said

premises for sale at public auction at the door of the courthouse (or on the premises) by publication for four successive weeks in some newspaper of general circulation in the county, and that said guardian thereupon proceed to offer and sell said premises in accordance with said notice and this order, at not less than two thirds of the appraised value thereof, upon the following terms, to wit: [*state terms*], said deferred payments to bear interest, and to be secured by mortgage upon the premises, and that he make report of his proceedings hereunder forthwith upon execution of the same.

R. S. Sec. 6286.

No. 1510.

Entry where Order is Made to Sell at Private Sale.

[*Caption.*]

[*Continuing from (a) in ante Form No. 1509*], and it being made to appear to the court that it will be for the best interests of said ward that said premises be sold at private sale, it is therefore ordered that said guardian proceed to sell said premises at private sale at not less than the appraised value thereof, upon the following terms, to wit: [*as in ante No. 1509*].

R. S. Sec. 6286.

No. 1511.

Entry when there is a Widow who Waives Dower by Metes and Bounds.

[*Caption.*]

[*Continuing from * in Form No. 1509*], and it appearing that —, widow of —, deceased, is entitled to dower in the premises in the petition described, and that she has by her answer filed herein waived the assignment of her dower therein by metes and bounds, and elected to receive its true value in money out of the proceeds of said premises, it is therefore ordered by the court that [*proceed with the order to appraise, etc., as in Form No. 1509, except to insert "free from dower."*]

No. 1512.**Approval of Appraisement and Order of Sale.**

[*Caption.*]

This cause coming on to be heard upon the return of the appraisement of the premises made herein, and the motion of plaintiff to approve the same and for an order of sale, and the court having carefully examined the said return, and finding that the appraisement has been legally made does therefore approve the same. And the said guardian having heretofore given a bond sufficient to cover the amount of money that may come into the hands arising from a sale of said premises, he is not required to give further bond. And the court finding that it is necessary to sell said premises as alleged in said petition, it is therefore ordered that the said guardian [*proceed as in ante No. 1509 from **].

No. 1513.**Entry of Hearing and Order for the Assignment of Dower and Appraisement.**

[*Caption.*]

This day this cause came on to be heard upon the petition of —, as guardian of —, a minor, for the sale of the real estate therein described, and the court being fully advised finds that the said ward [*name*] has been duly served with notice as required by law and the order of this court, and that all of the other defendants thereto have been likewise duly served with process herein, have due notice of these proceedings, and that — is the widow of —, deceased, and as such is entitled to dower in said premises.

It is therefore ordered that —, —, and —, three freeholders who are not of kin to the said petitioner, be and they are hereby appointed appraisers herein, and as such are required upon their oaths and actual view of said premises to set off and assign to the said —, widow, her dower interest in said premises, and that they thereupon proceed to appraise said premises subject to said dower interest, and that they make due report of their proceedings to this court.

No. 1514.

Entry ordering New Bond.

[Caption.]

It appearing to the court that the said guardian, —, has not given a bond sufficient to cover the amount which will probably be realized from the sale of the premises described in the petition herein, and the appraisement thereof having been this day returned, showing an appraisement thereof in the sum of \$—, it is therefore ordered that the said —, as guardian of said —, a minor, enter into an additional bond in the sum of \$—. And thereupon came the said —, and filed his bond in the sum of \$—, conditioned according to law, with — and — as sureties, which is approved by the court.

R. S. Sec. 6285.

No. 1515.

Entry approving Assignment of Dower and order of Sale.

[Caption.]

This cause came on to be heard upon the return of the order heretofore issued herein for the assignment of dower and appraisement of the premises in the petition described, and the court having carefully examined said proceedings and return, and finding the same to be in all respects regular and correct, therefore approves and confirms the same. It is therefore ordered that the said —, as such widow, hold the portion of said premises so assigned to her as and for her dower, as described and shown in said return according to law. [Then continue with order of sale as in ante Form No. 1509 from *.]

No. 1516.

Entry of Confirmation of Appraisement and giving Bond.

[Caption.]

This day came the plaintiff, T. M. C., guardian of M. V. H., T. H., and A. H., minors, and produced to the court the appraisement herein made by S. S., O. S., and N. G. H., of the real estate described in the petition, in pursuance of a former order of this court, and it appearing that said appraisement is in all things regular and correct the same is hereby

approved and confirmed. It is further ordered that said T. M. C., as such guardian as aforesaid, execute within — days to the state of Ohio a bond, with sufficient freehold sureties to the acceptance of the court, in the sum of \$——, conditioned according to law.

No. 1517.

Entry ordering New Appraisement—When twice Offered.

[Caption.]

It appearing from the return of the order of sale this day made by ——, as guardian of ——, a minor, that he has as such guardian twice offered said premises for sale at public auction under a former order of this court, and that the same have not been sold for want of bidders, it is now here ordered that the former appraisement of said premises be and the same is hereby set aside; and it is ordered that said premises be reappraised by the oaths of ——, ——, and ——, three freeholders of the county, and not of kin to the petitioner herein, and that when said premises are so appraised that the said ——, as such guardian, thereupon proceed to sell the same at public auction [*etc., as in former entry, No. 1509*].

No. 1518.

Entry of Confirmation of Sale.

[Caption.]

This day this cause came on to be heard upon the return of ——, as guardian of ——, a minor, of the order of (appraisement and) sale, and the motion of said guardian to confirm the sale therein reported to have been made by him. And the court having carefully examined said proceedings and return of said guardian, and finding the same to be in all respects regular and in conformity to the law and former order of this court, it is ordered that the said sale so made by said guardian to —— be and the same is hereby approved and confirmed; and it is ordered that the said ——, as such guardian, execute and deliver to the purchaser [*name*], a good and sufficient conveyance for the said premises described in the petition and order of sale, when the said purchaser shall have complied with all the terms of said sale.

It is further ordered that the said guardian pay the costs herein, taxed at \$——.

NOTE.—If there are any liens the forms in "Administrators' Sales" may be followed.

No. 1519.

Foreign Guardians—Sales by.

The same entries will apply to sales of real estate by foreign guardians.

The entry should recite the fact, if a fact, that the bond given by the foreign guardian where he was appointed is sufficient to cover the amount to be realized from the sale of the real estate. If not sufficient, he may be ordered to give new bond as in entry No. 1514.

LEASE OF WARD'S LANDS.

No. 1520.

Entry on Hearing of Petition—Appointing Freeholders to Report Opinion.

[*Caption.*]

This cause coming on to be considered by the court upon the petition of —, as guardian of —, a minor, for authority to lease the premises in said petition described and belonging to said ward, it is ordered that —, —, and —, three freeholders of the county, and not of kin to said petitioner, be and they are hereby appointed to view the premises, and report under oath their opinion of the probable cost of the improvements proposed by said guardian, and whether the lease proposed will be for the best interests of the said ward, and if so, upon what terms the lease should be made, and that they report their proceedings to this court on or before —, 18—.

R. S. Secs. 6296–99.

No. 1521.

Entry of Final Hearing of Petition and Report of Freeholders—Authorizing Lease.

[*Caption.*]

This day the petition for authority to lease the lands of the said ward, heretofore filed herein by —, guardian, came on for final hearing, and it appearing from the report of the freeholders heretofore appointed that they are of the opinion that the said lease should be made, and the court being of the opinion that it will be to the advantage of said ward to

improve and lease the said real estate as prayed for by said guardian, and that such lease is necessary to secure the improvements and increase the rents, and that such increase is necessary for [*any of the purposes named in the statute*], it is therefore ordered that the said —, as such guardian, be and he is hereby authorized to make a lease to — for the premises in the petition described at an annual rental of \$—, etc. [*upon such terms as the court shall deem proper*].

R. S. Sec. 6299. *

No. 1522.

Lease of Minor's Land for Gas or Oil—Entry of Filing of Petition—Ordering Notice.

[*Caption.*]

This day came —, guardian of —, a minor, and filed his petition for authority to lease the premises therein described for (petroleum oil or natural gas purposes). It is ordered that not less than — days' notice thereof and of the time set for the hearing of said petition be given the said ward (and all other defendants), and that the same be set for hearing on —, 18—.

R. S. Secs. 6301-2-3.

No. 1523.

Entry on Final Hearing.

[*Caption.*]

This day this cause came on for hearing upon the petition filed herein by —, as guardian of —, a minor, for authority to lease the premises therein described for (petroleum oil) (gas purposes), and it appearing that due and proper notice thereof has been given to the said ward (and other defendants thereto) according to law and the order of this court, and the court being satisfied from the evidence adduced that it will be for the best interests of said ward to lease said real estate for the purposes aforesaid, does grant the prayer of said petition, and it is therefore ordered that the said —, as such guardian, be and he is hereby authorized to make a lease of said premises for the purpose of boring for oil in accordance with the terms set forth in the petition, and when said lease is so made by said guardian that he report the same to the court for approval.

R. S. Secs. 6301-4.

No. 1524.**Entry approving Lease made for Oil Purposes, etc.**

[*Caption.*]

This day came —, guardian of —, a minor, and reported to the court the lease made by him in accordance with a former order of the court of the premises described in his petition to —, for the privilege of boring for oil upon the terms therein stated. And the court having examined said report and said lease, and finding the same in all respects regular, does therefore approve the same.

R. S. Secs. 6301-4.

No. 1525.**Lease for Mining Purposes.**

[*Caption.*]

[The proceedings are like the ordinary lease, and the entries at Nos. 1520-24 can be followed.]

R. S. Secs. 6301, 5 to 8.

No. 1526.**Report by Guardian of Royalty, and Bond Fixed.**

[*Caption.*]

This day came —, as guardian of —, and reported the royalty received by him as such guardian under the lease made by him of the ward's premises for [*state purposes*], for the six months after the execution of said lease, which said royalties amount to the sum of \$—. It is therefore ordered that the said guardian enter into an additional bond in the sum of \$— to cover the amount of money which may come into his hands from such lease, with sureties to be approved by the court. And thereupon said guardian presented his said bond in the sum of \$—, with — as sureties, which is approved by the court.

R. S. Secs. 6301-9.

INDENTURE OF WARD.

No. 1527.

Approval of Indenture by Probate Court.

[Caption.]

A. B., guardian of —, having produced to the court articles of indenture purporting to have been made on —, 18—, by him as such guardian, and the said —, by the terms of which the said A. B. as such guardian bound his said ward to the said — as in said indenture set forth, and the court being satisfied that the said — is a proper person to whom the said ward may be bound, and that the terms of said indenture are reasonable and just, the same is hereby approved.

R. S. Sec. 6293.

GUARDIANS OF LUNATICS, IDIOTS
AND IMBECILES.

No. 1528.

Entry of Appointment of Guardian of Lunatic, Idiot or Imbecile.

[Caption.]

This day this cause came on for hearing upon the application of — to be appointed guardian of —, an imbecile (*or*, an idiot, *or* lunatic), and the court being satisfied that due notice according to law has been given to the next of kin of said —, residing within the county, and that said — is an imbecile (idiot *or* lunatic), and incapable of taking care of and managing his property, and that the said — is a resident of this county, having a legal settlement in the township of —, in said county, it is therefore ordered that the said — be and he is hereby appointed guardian of the said —, an imbecile (idiot *or* lunatic), and that he enter into a

bond as such guardian in the sum of \$——, conditioned according to law, and with sureties to the approval of this court. And thereupon the said —— presents his bond as such guardian in the sum of \$——, with —— and —— as sureties, which bond being deemed by the court to be sufficient, is approved and ordered recorded. It is further ordered that letters of guardianship issue to the said ——.

R. S. Sec. 6302.

No. 1529.

Entry authorizing Sale or Adjustment of Dower Interest.

[*Caption.*]

This day came ——, as guardian of ——, an imbecile (*or* lunatic), and made application to the court for its approval of the sale of a certain right of dower (*or*, contingent right of dower), which his said ward has in the premises described in his said application, and of which the husband (*or* wife) of said ward —— was seized as an estate of inheritance. And the court being satisfied that it will be to the advantage of said ward to sell said dower interest as reported by said guardian and upon the terms set forth in his said application, the said sale so reported by him to have been made is hereby approved.

R. S. Sec. 6307.

No. 1530.

[As to proceedings to lease the lands of idiots, imbeciles, or lunatics, under Sec. 6308, to Sec. 6312, the same entries as in *ante* Nos. 1520-1526 can be modified for use.]

No. 1531.

Entry authorizing Guardian to Complete Contract.

[*Caption.*]

This cause coming on to be heard upon the petition of ——, guardian of ——, an imbecile (*or*, lunatic), for authority to complete a contract alleged to have been made by his said ward, and the court being satisfied that all parties hereto have been duly and legally notified hereof, finds that the said

—, on the — day of —, while he was of sound mind, entered into a contract with the said —, etc. [*Proceed as in form of entry in ante No. 1414.*]

R. S. Sec. 6313.

No. 1532.

Entry upon Filing of Petition to Improve Lands.

[*Caption.*]

This day came —, guardian of —, an imbecile, and filed herein his application for authority to improve the lands of his ward. It is ordered that the said guardian cause — days' notice hereof to be given to the wife (*or*, husband) of the said —, and to his next of kin, defendants hereto, and that said petition be set for hearing on the — day of —, 18—.

R. S. Secs. 6313-2.

No. 1533.

Same Continued—Entry appointing Freeholders.

[*Caption.*]

This cause coming further to be heard upon the petition of —, guardian of —, an imbecile, (and the answer of —, his wife) and the evidence, on consideration thereof the court finds that due notice according to law and the order of this court has been given to all of the parties and defendants herein, it is ordered that —, —, and —, freeholders of the county, be appointed as commissioners, whose duty it shall be to examine the premises proposed to be improved, and described in the petition herein, and to report to the court their opinion whether the improvement proposed will be advantageous to the estate of the said ward or not, within — days from this date.

R. S. Sec. 6313.

No. 1534.

Same Continued—Final Entry.

[*Caption.*]

[*May be moulded after Form No. 1523, ante.*]

R. S. Secs. 6313-3.

No. 1535.

Entry terminating Guardianship.

[Caption.]

It appearing to the satisfaction of the court that the said — has been restored to his reason, it is ordered that said guardianship be terminated, and that the letters of guardianship issued to —, as his guardian, be revoked, and that said —, as guardian, file herein his final account as such guardian.

R. S. Sec. 6316.

No. 1536.

Sale of Real Estate.

[Caption.]

[See ante Nos. 1508-1519.]

R. S. Sec. 6306.

GUARDIANS OF DRUNKARDS.

No. 1537.

Entry of Appointment.

[Caption.]

This day this cause came on to be heard upon the application of —, heretofore filed herein, for the appointment of a guardian of —, an alleged drunkard, and it appearing to the court that at least five days' notice in writing of this application, setting forth the time and place of the hearing of said application, has been served upon the said —, upon satisfactory proof the court finds that the said — is incapable of taking care of himself or of his property by reason of intemperance and habitual drunkenness.

It is therefore ordered that — be and he is hereby appointed guardian of the said —, an habitual drunkard, and that he enter into a bond as such guardian. [Proceed as in ante No. 1495.]

ACCOUNTS OF GUARDIAN.

No. 1538.

Entry of Filing of Account.

[*Caption.*]

This day came —, guardian of —, a minor, and filed his (partial) final account as such guardian, which the court orders advertised according to law and set for hearing on the — day of —, 18—.

No. 1539.

Entry Allowing Account.

[*Caption.*]

This cause came on to be heard upon the (first partial) final account of —, guardian of —, a minor, and it appearing to the court that said account has been advertised for hearing according to law, and having carefully examined the same and finding it in all respects correct and regular, it is therefore ordered that said account be and the same is hereby approved and allowed, and that it be recorded in the record of accounts of said court. And the court finds that there is a balance remaining in the hands of —, as such guardian, of the sum of \$—, which he is ordered to (hold according to law). (*Or*, pay over to his ward according to law.)

TRUSTEES FOR NON-RESIDENTS.

(*R. S. Secs. 6320—6327-3.*)

No. 1540.

Entry appointing Trustee of Non-Resident to Manage Real Estate.

[*Caption.*]

This day this cause came on for hearing upon the application to this court to appoint a trustee for certain premises

situated in — township, — county, in this state, of which J. C. died seized, as represented by application filed in this court, said premises being devised to W. C., the son of said J. C. On consideration whereof, and being fully advised in the premises, the court is of opinion that it is for the best interest of said W. C. and his estate to appoint a trustee to take charge of said premises until further order herein; it is therefore ordered that C. K. be and he is hereby appointed trustee to take charge of said real estate in said application described, belonging to said non-resident until further order of this court, with full power to lease and rent the same, collect all rents, to pay taxes on said premises, and all cost of insurance and repairs and necessary charges and expenses; and it is further ordered that he make due account to this court of his doings as such trustee. It is further ordered that said C. K. enter into a bond as such trustee in the sum of \$——, with sureties according to law.

R. S. Sec. 6320 *et seq.*

No. 1541.

Entry of Filing of Petition to Sell Real Estate of Non-Resident Minor—Ordering Service of Notice.

[*Caption.*]

This day came R. E., trustee of the estate of H. K., a non-resident minor, and filed his petition herein, praying for the sale of the undivided interest of said minor in the real estate in said petition described. It is therefore ordered that the plaintiff cause notice to be served on the defendants I. S., M. B., and L. Y., of the filing of said petition and the object and demand thereof, and that the same will be for hearing on the — day of —, 18—, and that plaintiff cause like notice, together with a certified copy of the petition herein, to be served on the defendants H. K. and W. W. K.

R. S. Sec. 6323.

No. 1542.

Entry of Hearing—Ordering Real Estate of Non-Resident Minor to be Subdivided and Appraised.

[*Caption.*]

This day this cause came on for hearing upon the petition, answer of W. W. K., widower, the answer of H. M. B.,

guardian *ad litem*, and the evidence, and was submitted to the court. On consideration whereof, and being satisfied that the notice heretofore ordered has been served upon the defendant H. K., and upon her father, W. W. K., with whom she resides, and that said H. K. has been duly and legally notified of the pendency and prayer of said petition, and that each and all of the other defendants have been duly and legally served (*or*, have entered their appearance herein), the court finds that, as set out in the petition, the real estate therein described ought to be sold as prayed for.

(And it appearing to the court that it will be to the advantage of said minor in common with the other defendants to have said lands divided in two tracts of — acres, it is therefore ordered that the petitioner herein cause the same to be done, dividing the same into two tracts as aforesaid, and return a plat thereof to this court; and he is hereby authorized to employ some competent surveyor to lay out and plat said lands.)

And it appearing that said widower W. W. K. by his answer waived the assignment of dower by metes and bounds, it is ordered and adjudged that after such subdivision said tracts be appraised free from dower upon the oaths of —, —, and —, three disinterested freeholders of the vicinity, and that due return be made of the proceedings hereunder.

No. 1543.

Entry approving Appraisement—Ordering Sale of Minor's Undivided Interest (Private) (Public).

[*Caption.*]

This day came the parties and this cause now coming on to be heard on the return of the appraisers heretofore appointed by the court of their proceedings in the appraisement of said premises, and the court being fully advised finds the same in all respects regular and in conformity to law, and therefore approves the same.

And the court finds that it is to the best interests of said minor to sell her undivided interest in said real estate. It is ordered that said R. E., trustee of said H. K., proceed to sell the undivided interest and share of said real estate as subdivided.

(And it appearing to the court upon the evidence adduced that it would be more to the interest of said minor to sell said real estate at private sale, it is therefore ordered, ad-

judged, and decreed that the said trustee proceed to sell said undivided part and interest of said minor in the real estate described in the petition in two tracts, as shown in the report of the said appraisers, free from dower, at private sale, at not less than the appraised value thereof, for cash, etc.

NOTE.—For entry confirmation, the usual entries as given in previous pages 902, 903, 904.

No. 1544.

Entry ordering Transfer of Funds of Non-Resident Minor to Foreign Guardian.

[*Caption.*]

This day this cause came on to be heard upon the petition of A. F. W., foreign guardian of H. K., a non-resident minor, heretofore filed herein, for the transfer of the funds in the hands of R. E., trustee of said H. K., non-resident minor, to him as such foreign guardian. The court upon careful consideration of the premises doth find that the said R. E., trustee aforesaid, has waived the service of notice upon him, and has entered his appearance herein, and that said A. F. W., said foreign guardian, has produced and filed herein an exemplification under the seal of the clerk of the ——— court of ——— county, ———, which is in all respects in compliance with law.

It appearing that it is for the best interests of the estate of said minor that said funds now in the hands of said trustee should be transferred to such foreign guardian, the court doth order that said R. E. shall transfer and pay to said A. F. W., said foreign guardian, the amount now in his hands belonging to the estate of said minor, and make report to this court in his final account.

R. S. Sec. 6326.

ASSIGNMENTS FOR CREDITORS— INSOLVENT DEBTORS.

No. 1545.

Deed of Assignment Filed.

[*Caption.*]

On this — day of —, 18—, at the hour of — o'clock — M., there was filed in this court a deed of assignment from — to — for the benefit of the creditors of said —.

R. S. Sec. 6335.

No. 1546.

Entry of Filing of Bond by Assignee.

[*Caption.*]

This day came —, named in the deed of assignment heretofore filed herein by —, as the assignee thereof, and accepted said trust, and filed herein his bond as such assignee in the sum of \$—, conditioned according to law, with — and — as sureties, which bond is approved. And thereupon upon motion of said —, —, —, and — are hereby appointed to appraise the property and assets of the said —, and said assignee is required to return said appraisal to this court without delay.

No. 1547.

Entry removing Assignee and appointing Trustee.

[*Caption.*]

A. B., who was named in the deed of assignment filed in this court on the — day of —, 18—, by S. F., as the assignee thereof, having failed for ten days after the execution of said deed of assignment to appear in this court and file his bond as required by law, the court therefore upon application of — (assignor) or (—, creditor) orders that the said A. B. be and he is removed as such assignee.

It is further ordered by the court that — be and he is hereby appointed trustee herein in place of said — as such assignee, and that said — enter into a bond as such trustee in the sum of \$—, with sureties to the approval of the court. And thereupon the said — filed his bond in the sum of \$— as such trustee, with — and — as sureties thereon, which is approved by the court. [*Appointment of appraisers as in ante No. 1546.*]

R. S. Sec. 6336.

No. 1548.

Entry showing Resignation of Assignee and Appointment of Trustee.

[*Caption.*]

This day came A. B. and tendered herein his resignation as assignee of —, an insolvent debtor, which for satisfactory reasons is accepted by the court.

It is therefore ordered by the court that — be and he is hereby appointed as trustee in trust for the benefit of creditors herein, and that as such trustee he enter into a bond in the sum of \$—, with sureties to the approval of the court. And thereupon the said — filed his bond, etc., [*as in ante No. 1546.*]

R. S. Sec. 6337.

No. 1549.

Entry of Filing of Complaint against Trustee by Creditors.

[*Caption.*]

A complaint by the creditors of —, assignor, having been this day filed against —, assignee, it is ordered that a citation issue to the said assignee and assignor requiring them to appear before this court on the —, 18—.

R. S. Sec. 6338.

No. 1550.

Entry on Hearing of Complaint—Fixing Day for Election of Trustee for Creditors.

[*Caption.*]

This day this cause came on for hearing upon the complaint heretofore filed herein by the creditors of said —,

assignor, against — as assignee herein, and it being made to appear to the court that said complaint is true, and a petition having been filed herein by the creditors of the assignor, owning not less than one thousand dollars of debts against said assignor, it is ordered that —, 18—, be fixed for the election by the creditors of a trustee of said —, and that notices be sent to the creditors of said date according to law.

R. S. Sec. 6338.

No. 1551.

Entry appointing Trustee chosen by Creditors.

[*Caption.*]

This day came —, who was chosen as the trustee of —, assignor, at the election by creditors held —, 18—, and presented to the court his bond as such trustee. And the court being satisfied that the said — was duly and legally elected by the said creditors as such trustee, and deeming him a suitable person to be appointed as such trustee, the said choice so made by the said creditors is hereby approved, and the said — is hereby appointed as such trustee of —, and the said —, as assignee, is hereby removed.

R. S. Sec. 6338.

No. 1552.

[For removal of assignee under Sec. 6339, follow and modify form No. 1389.]

No. 1553.

**Entry of Appointment of Trustee for Property Recovered under
R. S. Sec. 6344.**

[*Caption.*]

This day came —, one of the creditors of —, and made application for the appointment of a trustee.

No. 1554.

Entry of Filing of Inventory and Appraisement.

[*Caption.*]

This day came —, assignee of —, an insolvent debtor, and filed an inventory and appraisement of the property and assets of the said —, together with a schedule of the liabilities which are ordered by the court to be recorded.

No. 1555.

Entry ordering Assignor to Appear and be Examined.

[*Caption.*]

Upon motion of —, a creditor of —, an insolvent debtor, it is ordered that the said assignor, —, be and appear before this court on the — day of —, 18—, and submit to an examination upon oath on all matters relating to the disposal of his property.

R. S. Sec. 6349.

No. 1556.

Filing of Sale Bill.

[*Caption.*]

This day came —, assignee of —, an insolvent debtor, and filed herein his sale bill of the personal property sold by him at public auction, which is approved and ordered recorded.

No. 1557.

Entry Order for Sale of Personal Property at Public Auction.

[*Caption.*]

On application of G. L. C., assignee in said matter, for an order to sell the planing mill equipment, to wit: [*describe the property*], set out in schedule — of the inventory and appraisement of said assignor, heretofore filed in this court, it is ordered that said assignee proceed to advertise said property for sale, and to sell the same at public auction on the premises to the highest bidder, according to law, and that the planing mill equipment, to wit: [*describe property*],

be sold as a whole, and upon the following terms, to wit: [*state terms*], said deferred payments to be evidenced by notes secured by mortgage on the property sold, and that he make due return of his doings concerning such sale as the statutes require.

No. 1558.

Entry authorizing Personal Property to be Sold at Private Sale.

[*Caption.*]

This cause coming to on be heard upon the application of —, assignee, for authority to sell the personal property mentioned and described in his said application at private sale, and the court being satisfied that it would be to the advantage of the creditors of the assignor to sell said property at private sale, it is ordered that the said —, as such assignee, proceed to sell said personal property at private sale (for not less than two thirds the appraised value), and for good cause shown said assignee is authorized to sell the same for [*less than two thirds*], upon the following terms, to wit: [*state terms*].

R. S. Sec. 6350c.

No. 1559.

Sale of Personal Property ordered at Public Auction when not Sold at Private Sale.

[*Caption.*]

This day came —, assignee of —, an insolvent debtor, and returned the order for private sale of the personal property heretofore issued herein; and it appearing that said assignee has not sold the said personal property within the time prescribed by the order, it is ordered that said assignee proceed to sell said property at public auction according to law.

R. S. Sec. 6350d.

No. 1560.

Entry ordering Business of Assignor carried on by Assignee.

[*Caption.*]

This day this cause came on to be heard upon the application of the assignee of A. D., an insolvent debtor, and the

creditors, for authority to carry on the business of said assignor, and the court being fully advised in the premises finds that it will be to the advantage of the creditors of said assignor to carry on said business, as prayed for, and does therefore grant said application and empower and order the said —, as such assignee, to carry on the said business of said assignor, and to sell the said goods and property of said assignor in the regular course of business, until the further orders of the court, and make due report of the sales so made by him to the court.

R. S. Sec. 6350½.

No. 1561.

Entry ordering Discontinuance of Business by Assignee.

[*Caption.*]

It appearing to the court that it will be to the best interest of the creditors of said assignor to discontinue the carrying on of the business of said assignor, it is therefore ordered that the said —, assignee, discontinue said business, and that he proceed to sell the remaining property so assigned to him, at public auction according to law.

R. S. Sec. 6350.

No. 1562.

Entry upon Motion to strike Property from Inventory where Assignor has sold Same prior to Assignment.

[*Caption.*]

This day this matter came on to be heard on the motion of S. C. & Co. and L. M. B., heretofore filed herein, to strike from the inventory and appraisement of the assets of said assignor certain piles of lumber in said motion referred to and embraced in said inventory and appraisement herein, and on the exhibits, testimony, and arguments of counsel in behalf of said movers, of the assignee, and of certain general creditors of said assignor.

On consideration whereof, and being fully advised in the premises, the court finds that said lumber had, prior to said assignment, for full value, been sold, transferred, and set over to said moving parties, S. C. & Co. and L. M. B., and had for several months been, and then was, and has ever since been, in the *bona fide*, full, and unquestioned possession and

control of said movers under the terms and conditions of said sale and transfer to them, and that said motion ought to be sustained.

It is thereupon ordered and adjudged that said motion be and the same is hereby sustained, and said several piles of lumber in said inventory and appraisalment hereinbefore so described be and they are wholly stricken from said inventory and appraisalment as improperly embraced therein, and said assignee is hereby relieved and discharged from all further duties and responsibility with reference thereto, or to any part or portion thereof, at the cost, taxed at \$——, of said assignee, to be paid from the general funds in his hands as such assignee.

No. 1563.

**Entry determining Title and Ownership of certain Accounts
transferred by Assignor before Assignment.**

[*Caption.*]

This day this matter came on to be heard upon the application of C. T., heretofore filed herein, praying for an order of court to determine the title and ownership of certain accounts and the proceeds thereof in said application set forth, and that the said assignee herein may be required to and deliver the same to said applicant.

Upon consideration thereof and of the evidence and arguments of counsel, the court finds that the book accounts set forth and described in said application were on or about the — day of —, 18—, and prior to the assignment of E. K. to said G. L. C., transferred and assigned for a valuable consideration by said E. K. to said C. T.; that said assignment and transfer of said accounts was made and delivered in the manner and for the purposes set forth in said application; and that said applicants are entitled to have said accounts and proceeds thereof.

It is therefore considered, ordered, and adjudged that said applicants are entitled to said accounts and the proceeds thereof, and that said assignee pay to them all amounts which he has collected or may hereafter come to his hands on account of said claims.

No. 1564.

**Entry ordering Assignee to Pay for Goods Not Delivered until
after Assignment Made.**

[*Caption.*]

This cause came on to be heard upon the application of G. W. L., filed herein, and the answer of G. L. C., assignee of said E. K. & Co., and the evidence; and in consideration thereof the court finds that the said E. K. & Co. purchased, on account of the contract set out in the application, lumber to the amount of \$——, and that said lumber was, on or about the — day of —, delivered to said E. K. & Co. at —, Ohio, and came into the possession of said G. L. C. as such assignee, and was of the value of \$——. And the court further finds that said G. W. L. are entitled to have paid to them by said assignee the sum of \$—— as a preferred claim upon the proceeds of the sale of lumber which came into his hands, and the court therefore orders and adjudges that said G. L. C., as such assignee, pay to said G. W. L. said sum of \$—— as a preferred claim as aforesaid.

No. 1565.

**Entry upon Motion of Assignee for Advice and Direction as
to Renting Property.**

[*Caption.*]

This day came G. L. C., as assignee in trust for the benefit of the creditors of E. K. —, and filed his application herein, asking for the advice and direction of the court as to the offer of C. P. to rent the (planing mill) belonging to said estate, located [*state location*], for the period of one year at a rental of \$——, payable [*state how*].

On consideration whereof the court finds that the facts stated in the petition are true, and that it will be for the best interests of the creditors of said assignor, and of said assignor for said assignee to accept said offer and to rent said mill to said C. P. for said time upon said terms of rental.

It is therefore considered, ordered, and adjudged that said G. L. C., assignee as aforesaid, lease said premises to said C. P. for the period of one year, and for the sum of \$——, payable [*state how*].

No. 1566.**Entry ordering Payment of Interest on Mortgage.**

[*Caption.*]

This day came G. L. C., as assignee in trust for the benefit of the creditors of E. K., and filed his application herein, asking the permission of the court for payment of the interest due on a certain mortgage upon the described property, given on the — day of —, 18—, to —, said interest amounting to \$—. On consideration whereof the court doth find that the facts stated in the petition are true, and it is therefore ordered and adjudged that said G. L. C., as such assignee, pay the interest so as aforesaid due on the mortgage to said —, provided that said mortgagee shall agree to pay back the amount of said interest to said assignee in the event that the property covered by said mortgage shall sell for sufficient to pay said mortgage claim and interest.

No. 1567.**Entry upon Motion of Assignee for Advice and Direction as to Insurance upon Property Assigned.**

[*Caption.*]

This day came G. L. C., as assignee in trust for the benefit of the creditors of E. K., and filed his application herein, asking for the advice and direction of the court as to the insurance on the property assigned to him by said E. K., and for an order as to the payment of the earned premiums on the several insurance policies covering the property so assigned to him, and the same was submitted to the court on the arguments of counsel and the evidence, and on consideration whereof the court doth find that the facts stated in said application are true, and that it will be for the best interest of the creditors of said assignor, and of said assignor for said assignee to accept a transfer of said insurance policies from said companies as set out in schedule — attached to the application, and to pay for the premiums upon said policies.

It is therefore considered, ordered, and adjudged that said G. L. C., assignee as aforesaid, pay the earned premiums upon said several policies as set out in the schedule filed with said application, to wit, the sum of \$—, first out of any money now in his hands or that may come into his hands as assets belonging to said estate.

No. 1568.

Entry authorizing Assignee to Repair Property.

[*Caption.*]

This cause coming on to be heard upon the application of G. L. C., assignee, for permission to repair the roof over the planing mill and boiler house belonging to said estate, situate on — street, in the city of —, Ohio, and the court upon consideration of the same does authorize and direct said assignee to repair the said roof over said planing mill and boiler house, and to pay for the same out of the rents of said property.

No. 1569.

Entry authorizing Assignee to Compromise and Settle Claim against Debtor.

[*Caption.*]

This cause coming on to be heard upon the application of said assignee for permission to compromise and settle the claim of said assignor against the — company of —, amounting to \$—, for — percent of the face value of said claim, to be paid [*state how*].

Upon consideration whereof the court orders and directs said assignee to compromise and settle said claim for — percent of the face value thereof, and to accept in payment of said settlement the notes of the said —, falling due in — months from date, with security to be approved by this court.

No. 1570.

Entry authorizing Assignee to Pay for Services rendered Assignee.

[*Caption.*]

This cause coming on to be heard upon the application of assignee, for the direction of the court as to the payment of the bill of E. K. for services rendered said assignee in the matter of the said estate, and the court upon consideration thereof does order and direct said assignee to pay said E. K. at the rate of \$— per day for the time said E. K. was actually employed by said assignee as aforesaid.

No. 1571.

Entry fixing Amount of Fees of Appraisers.*[Caption.]*

Upon the application of G. L. C., assignee in trust for the benefit of the creditors of E. K., to the court for an order fixing the amount of the fees to be paid the appraisers of said estate, the court on consideration thereof does fix said fees at the amount of \$——, to be paid to each of the said appraisers, \$—— thereof being the amount of the fees of the appraisement of the personal property, and \$—— being for the appraisement of the real estate belonging to said trust. •

**ASSIGNMENTS—SALE OF REAL ESTATE
BY ASSIGNEE.**

No. 1572.

Entry ordering Sale of Real Estate.*[Caption.]*

This day this cause came on to be heard upon the petition of ——, assignee of A. D., an insolvent debtor, for the sale of the real estate therein described and assigned to him by said —— (the answer and cross petition of R. S., and the answer of ——, wife of said assignor), and it appearing that all parties in interest are properly before the court herein, and the court being fully advised in the premises, finds that there is due the said R. S. upon the claim set up in his said answer and cross petition the sum of \$——, and that the said ——, assignor, and ——, his said wife, gave the mortgage set up in said answer and cross petition, and that said mortgage is a valid and subsisting lien upon the premises described in the petition of said assignee herein, and assigned to him by the said assignor, ——, and that the said ——, wife of said assignor, has a contingent right of dower in the said premises, in any surplus over and above the payment of the mortgage of the said R. S. (*or*, except in the premises covered by the mortgage of the said R. S.), and that she has by her

answer elected to receive the value of the same in money out of the proceeds of sale, and the said premises having been heretofore appraised by the appraisers appointed to make an appraisement of the personal estate of said assignor, it is ordered that the said assignee proceed to advertise and sell the said premises (free from the contingent right of dower of the said —), according to law, upon the premises (*or*, at the door of the courthouse), upon the following terms, to wit: [*state terms*], and that he make due report of his proceedings hereunder.

No. 1573.

Ordinary Entry when there are no Liens.

[*Caption.*]

This day this cause came on to be heard upon the application of —, assignee of —, an insolvent debtor, for the sale of the real estate assigned to him, and it appearing that the said premises have been heretofore appraised, and that said appraisement was regularly and duly made, it is ordered that said assignee proceed to advertise and sell said premises according to law, at public auction at the door of the courthouse (*or*, on the premises), at not less than two thirds of the appraised value thereof, upon the following terms, to wit: [*state terms*], and that due return of such sale be made herein.

R. S. Sec. 6350a.

No. 1574.

Entry confirming Sale and ordering Deed.

[*Caption.*]

This cause coming on to be considered upon the return of —, assignee, of the order of sale heretofore issued herein, and the motion to confirm the sale therein reported to have been made by him to —, and the court having carefully examined said return, and being satisfied that the said sale has been regularly and legally made, it is ordered that the same be and is hereby approved and confirmed, and it is ordered that the said —, assignee, execute and deliver to the said —, purchaser, a good and sufficient deed for the premises so sold to him, upon the said purchaser complying with all the terms of said sale.

It is further ordered that the said assignee, out of the proceeds of said sale, pay, first, the taxes (and street assessments), and that he hold the balance subject to the further orders of this court.

The entries in sales by executors and administrators may be followed, *ante* pages 891, 907.

No. 1575.

Entry ordering Sale at Private Sale.

[*Caption.*]

[*The entry at ante No. 1458 may be followed.*]

The entries in sales by an assignee adjusting liens, etc., are so similar to those in sales by executors and administrators that the latter, found from page 891 to 907, may be followed.

No. 1576.

Entry allowing Chattel Mortgage, and ordering Same Paid.

[*Caption.*]

This day this cause came on to be heard upon the application of A. B., a preferred creditor of the said assignor, praying the court to find and adjudge the mortgage held by him on the goods and chattels assigned by the said A. E. S. to the said C. C. to be a valid lien thereon, and said application was on this day, after due notice to all the creditors, heard upon the evidence. Whereupon the court finds that there is due the said J. W. M. on his claim set forth in his said application the sum of \$——, with interest at — percent from —, 18—, as specified in said note; and the court further finds that in order to secure the payment of said promissory note in said application set forth the said A. E. S. executed and delivered to the said J. W. M. a mortgage upon the goods and chattels in said mortgage designated, which mortgage said J. W. M., after making due affidavit thereon, filed with the recorder of — county, Ohio, as stated in said application; that said mortgage is valid and was the first and best lien on said goods and chattels in said mortgage described when they were sold by the assignee, and that by reason of said mortgage said J. W. M. has a valid and the first lien upon any and all of said goods and chattels remaining unsold, and also upon the fund arising from any and all of said goods and chattels in said mortgage described sold by the said assignee.

It is therefore ordered by the court that the said assignee, out of the proceeds of the sale of said goods sold, and which may hereafter be sold, after paying the costs and expenses of administering this trust, pay to the said J. W. M., or to his attorney, the amount of his claim if sufficient there be for that purpose.

No. 1577.

Entry of Judgment and Order fixing Priority of Liens.

[*Caption.*]

This day this matter came on to be heard by the court upon the application of the assignee herein for an order determining the priority of liens on the proceeds of the sale of the personal property of said assignor, the separate applications filed herein of A. H. J., the M. & M. Bank, and B. S., and upon the evidence, and the same was submitted to the court. On consideration whereof the court finds that the said B. S. recovered a judgment, and execution was issued thereon, and levied on the goods and chattels then the property and in the possession of said assignor, and said goods and chattels were seized by the said sheriff in execution as is alleged in said application of said B. S.; that the said judgment lien of B. S. is a good and valid lien as and from the time of the levy of this said judgment as stated in said application upon the proceeds of the property included and described in schedule E, of the inventory and appraisement herein, and there is due thereon to said B. S. the sum of \$——, with interest from ——, 18—, and \$——, costs of suit, and also \$——, increased cost; that the said respective chattel mortgages of said bank and said J. individually are each also good and valid liens upon the proceeds of the property included and described in said schedule E, as and from the respective times said mortgages were filed in the recorder's office as stated in said application herein, and there is due to the said bank on its said claim so secured by its said chattel mortgage the sum of \$——, with interest from ——; and there is due to the said J. on his said claim so secured by his said chattel mortgage the sum of \$——, with interest from ——; that the said liens of B. S., said bank, and said J., as aforesaid, are upon the same fund; that, in addition to their said liens on said fund as aforesaid, the said bank and said J. have each a lien upon the notes and book accounts mentioned and described in said application, which said notes are held by said bank and J. as collateral security for their

said claims, and that said B. S. has no lien whatever on said notes and accounts or any part thereof; that it is equitable that said bank and said J. should be first required to exhaust said notes and accounts so held by them as collateral security as aforesaid, according to law, and apply the same or the proceeds thereof to the payment of their said claims and lien before being permitted to share in the proceeds of said property described and embraced in said schedule E, as aforesaid; that it is also equitable that whatever balance of the proceeds of the property embraced in said schedule E, as aforesaid, may remain after the payment therefrom of the liens thereon, if any, that may hereafter be determined to be prior in right to the said liens of said B. S. shall be applied as follows: that is to say, first to the payment and satisfaction of the balance of the claims and lien of said bank, if any, that may remain after said bank has exhausted and applied to the payment and satisfaction of its said claim and lien, according to law, the said notes and accounts held by it as collateral security as aforesaid; but if no such balance of the claim of said bank shall remain, then ratably to the payment and satisfaction of the claim of said B. S. and of whatever balance, if any, that may remain unpaid upon all said claims and lien of said J. after he shall have exhausted and applied to the payment and satisfaction of his said claims and lien, according to law, the said notes and accounts held by him as collateral security as aforesaid, and in the ratio of said claim of B. S. to such balance, if any, of the said claims and lien of said J.; but if there remains no such balance upon the said claims of said J., then wholly to the payment and satisfaction of the said claim and lien of the said B. S.

It is therefore ordered, adjudged, and directed by the court that said bank and J. be and they are hereby required to exhaust according to law the said notes and accounts so held by them as collateral security as aforesaid, and apply the same or the proceeds thereof to the payment of their said claims and lien before they — share in the proceeds of the property embraced and described in said schedule E, as aforesaid; and that whatever balance of the proceeds of the property embraced in said schedule E, as aforesaid, shall remain after the payment therefrom of the liens thereon, if any, that may hereafter be determined to be prior in right to the said liens of said B. S., said bank, and said J., shall be applied as follows: that is to say, first, to the payment and satisfaction of the balance of the claim and lien of said bank, if any, that may remain after said bank shall have exhausted and applied to the payment and satisfaction of its said claim and lien,

according to law, the said notes and accounts held by it as collateral security as aforesaid; but if no such balance of the claims and lien of said bank shall so remain, then ratably to the payment and satisfaction of the claim of said B. S. of whatever balance, if any, may remain unpaid upon the said claims and lien of said J. after he shall have exhausted and applied to the payment and satisfaction of his said claim and lien, according to law, the said notes and accounts held by him as collateral security as aforesaid; and in the ratio of said claim of B. S. to such balance, if any, of said claims and lien of said J.; but if there shall then remain no such balance upon the claims and lien of said J., then wholly to the payment and satisfaction of the said claim and lien of B. S.

No. 1578.

Entry ordering Assignee to Pay Preferred Claim.

[*Caption.*]

This day came — and filed his application for an order of court authorizing G. L. C., as assignee of E. K., insolvent debtors, to pay out of the proceeds now in the hands of said assignee and realized from the sale of the personal property, including the machinery, a claim for labor and material furnished by said — to the said E. K., amounting to the sum of \$—, and representing that he has taken a lien upon the property of the said E. K.

This cause coming on for hearing, the said assignee being represented by his counsel, and the court having heard the arguments of counsel and the evidence, finds that the said — did, on the — day of —, 18—, file with the recorder of — county a sworn statement of their said account for labor and material furnished by them to the said E. K., which said attested account was by said recorder recorded on the — day of —, 18—, Records of Liens, Vol.—, at pages —, which said claim became on said — day of —, 18—, and is now a valid and subsisting lien upon the property and machinery of said E. K. assigned to the said G. L. C., and is entitled to be paid out of the funds now in the hands of said assignee derived from the sale of the machinery.

It is therefore considered, ordered, and adjudged by the court that said assignee pay out of said fund the said claim and lien of the said —, amounting to the sum of \$—, with interest at — percent from —, 18—.

No. 1579.**Entry of Allowance of Preferred Claims under Sec. 6355.**

[*Caption.*]

This day this cause came on to be heard upon the application of A. H. J., assignee, for an order determining the validity and priority of the work and labor claims set forth in said application; and the court finds from the evidence that the claims of J. N., etc., amounting to \$——, are the valid claims for labor as operatives in the service of the said assignors, performed within twelve months preceding the assignment.

And the court find that all of said claims in the amounts herein found due are the next best lien after the taxes and the costs of administering the assets of said assignors, including the assignee's fee and a reasonable attorney's fee to be hereafter determined, and should be so paid. The court further orders said assignee, after paying the taxes and the costs of the court, including assignee's and attorney's fees, to pay out of said funds to said parties the amounts of their claims herein found due.

No. 1580.**Entry of Filing of Application to sell Desperate Claims.**

[*Caption.*]

This day came ——, assignee of ——, an insolvent debtor, and filed herein his application for authority to sell desperate claims therein set forth. It is ordered that the said assignee cause notice thereof to be given by [*state how notice shall be given*], and that said application be set for hearing on the — day of ——.

No. 1581.**Order to Sell Desperate Claims.**

[*Caption.*]

This cause coming on for hearing upon the application of ——, assignee of ——, an insolvent debtor, for authority to sell certain claims belonging to said assignor which are desperate and difficult of collection; and due notice of the filing and time set for the hearing of said application, and

the court being fully advised, grants said application and orders that the said assignee proceed to (compromise and adjust, etc.), advertise and sell the claims set forth in his said application.

R. S. Sec. 6350.

No. 1582.

Entry authorizing Completion of Contract.

[*Caption.*]

This day this cause came on to be heard upon the petition of —, assignee of —, an insolvent debtor, for authority to complete the contract therein set forth, and the court being fully advised finds that the parties hereto have been duly and legally notified of this proceeding, that the said —, on the — day of —, 18—, entered into a contract with one — for [*state nature of contract, as —*] for the sale of the premises described in his said petition. And it appearing that the said — is ready and willing to carry out and complete his part of the contract, and that it will be for the best interest of the creditors of said assignor that said contract be carried out, it is ordered that said —, as assignee, be and he is hereby authorized to complete and carry out said contract according to its terms, and that upon the said — complying with his part of said agreement by paying the purchase price for said real estate, the said —, as such assignee, execute and deliver a deed to said — for the said premises according to law.

No. 1583.

Requisition to Reject Claim—Entry.

[*Caption.*]

This day came — (assignor) one of the creditors of the assignor herein, and filed herein a written requisition on —, as assignee, to disallow and reject a certain claim presented to him by — for — dollars; and the said — having also entered into a bond in the sum of — dollars, conditioned to pay the costs and expenses connected with the contesting of the same, which bond is approved, it is ordered that the said —, assignee, disallow and reject the said claim of — so presented to him for allowance.

R. S. Sec. 6353.

No. 1584.**Entry of Filing of Account by Assignee.**

[*Caption.*]

This day came —, assignee of —, an insolvent debtor, and filed herein his final (first partial) account as such assignee, which the court orders set for hearing on the — day of —, 18—, and that due notice thereof be given according to law.

No. 1585.**Entry allowing Account—Dividend Ordered.**

[*Caption.*]

This day this cause came on to be heard upon the final account of —, assignee of —, an insolvent debtor, and it appearing that due notice according to law has been given of the filing and of the time set for the hearing thereof, and no exceptions having been filed thereto, the court having carefully examined the same, and finding the same in all respects regular and correct, it is ordered that said account be and the same is hereby approved and allowed.

And the court finds that there remains a balance in the hands of said assignee after paying all the costs and expenses of administration in the sum of — dollars, and that there have been claims presented to and allowed by said assignee, amounting to the sum of — dollars, and that the amount in his hands aforesaid will pay upon said claims a dividend of — percent.

It is therefore ordered that the said assignee pay upon the claims so presented to and allowed by him a dividend of — percent, and that he give notice according to law of the time and place of payment of said dividend, and that he report payment thereof to this court without delay.

No. 1586.**Entry of Filing Report of Dividend and Discharge of Assignee.**

[*Caption.*]

This day came —, assignee of —, an insolvent debtor, and filed his report of the dividend paid by him as such as-

signee according to the former order of the court. It is ordered that said report be recorded, and it appearing that the said assignee has paid out all the funds coming into his hands as such assignee, and that he has fully performed all of the duties required by law of him, it is ordered that he be and is hereby discharged as such assignee.

No. 1587.

Entry authorizing Assignee to Accept Bid.

[*Caption.*]

This cause coming on to be heard upon the application of the assignee herein as to bids received by him in response to an advertisement therefor, and in response to his personal efforts to obtain bids for the purchase of the balance of the stock on hand, and for the safe and all fixtures in said assignment, and it appearing from said report that the bid of J. W. for the sum of \$—— is the highest and best bid therefor, and that it would be for the best interest of the creditors in said matter to accept said bid of said J. W., it is hereby ordered that C. C., assignee, accept said bid and sell said property to said J. W. at private sale for the sum of \$——, and make due report thereof.

No. 1588.

Entry ordering New Appraisement on Account of Mistake in Description by which First Appraised.

[*Caption.*]

It appearing to the court that in the inventory and appraisement heretofore filed in this court in the matter of the assignment of E. K., no appraisement was made of the real estate described respectively in —— tracts in the petition to sell real estate heretofore filed in this case, and it appearing further that in said inventory and appraisement the real estate described in the fifth, etc., tracts in said petition was attempted to be appraised under the following description: [*give description briefly, showing particular mistake*], and that said description is untrue, vague, and uncertain, and the attempted appraisement thereunder does not constitute a valid and legal appraisement.

It is therefore ordered that the assignee above named cause said — tract, as follows: [*description*], and said fifth tract, as follows: [*description*], to be appraised according to law by —, —, and —, and return said appraisement to this court forthwith.

No. 1589.

Entry ordering Property upon which Executions are Levied on Prior to Assignment to be Turned over by Sheriff to Assignee (by consent)—Transferring Liens to Proceeds.

[*Caption.*]

It now appearing to the court that, prior to the filing of the deed of assignment herein, the sheriff of said county seized in execution upon judgment against said assignors rendered by the court of common pleas of said county in favor of B. B. for the sum of \$—, the entire stock of goods, wares, merchandise, fixtures, and other property of the said E. R. G. & Co., comprising — floors at No. —, — street, said stock consisting of [*state*], and said sheriff has ever since and now holds possession thereof and every part thereof under said execution and the levy thereof on said property; and it now appearing that prior to said assignment certain instruments purporting to be chattel mortgages upon the property now in the sheriff's possession, together with other property, were made and delivered by said assignor to the M. & M. Bank of —, and to A. H. individually, and the same were filed in the recorder's office of said county, as appears of record, and now remain on file. And it further appearing to the court that it will be for the benefit of all parties that said assignee should come into possession of the said property now held by said sheriff as aforesaid, and that the said property should be delivered by said sheriff to the said assignee, to be sold by him instead of by the said sheriff, and that the proceeds thereof should stand in place of the property itself, and that the nature, extent, validity, and priority of the rights and liens of all the parties should be and remain in said proceeds as they now exist in said property without any waiver of or prejudice to the rights of any of the parties, either with respect to each other or to said assignor.

Now, therefore, it is hereby ordered by the court that upon the delivery by said sheriff of said goods and property as aforesaid to the said assignee, that the said assignee shall take possession of the same, and convert the same into money

under the assignment laws of this state, and hold the proceeds thereof subject to the further order of the court; and that the rights of all parties in and to such proceeds shall stand and remain therein as they existed in such property or any part thereof at the time of such delivery, the nature, extent, validity, and priority of the rights and liens of all the parties in said proceeds to be hereafter determined by the court without any waiver of or prejudice to such rights or liens of the parties, either with respect to each other or with respect to said assignor.

No. 1590.

Entry continuing Consideration of Bids.

[*Caption.*]

This cause coming on to be heard upon the report of the assignee as to bids received by him in response to his personal efforts to obtain bids for the sale, at private sale, of all or any part of the property of said assignor set out in schedule — of the inventory and appraisement of the property of said assignor hereinbefore filed in this court, and it appearing from said report and said bids, which were opened and read in the presence of the court, that G. B., J. N., and S. R. have each bid two thirds or more of the appraised value for the property included in such schedule, it is ordered that the consideration of said bids be continued till —, 18—.

No. 1591.

Entry authorizing Assignee to accept Bid and sell Property at Private Sale.

[*Caption.*]

This cause coming on to be heard upon the report of the assignee herein as to bids received by him, in accordance with the order of this court made on the — day of —, 18—, for the sale, at private sale, of all or any part of the personal property of said assignor included in schedule — of the inventory and appraisement of said assignor heretofore filed herein, for not less than two thirds of the appraised value thereof, and it appearing from said report and bids filed therewith that the bid of E. K. for the lumber contained in said schedule for — percent of the appraised value thereof, upon the following terms, to wit, \$—— to be in cash and

the balance to be evidenced by three notes falling due respectively in six, nine, and twelve months from date, bearing interest at — percent per annum, and with sureties to be approved by this court, is the highest and best bid therefor, and that it will be for the best interest of the creditors in said matter to accept said bid of E. K., it is hereby ordered that said G. L. C., assignee, accept said bid and sell said property to said E. K. at private sale, at said price, and upon said terms of payment.

No. 1592.

Entry Confirmation of Sale of Personal Property.

[*Caption.*]

This cause coming on for hearing upon the report of G. L. C., assignee, of his proceedings and sale of personal property to E. K., said report having been filed in this court on the — day of —, 18— (a number of creditors being present and no one objecting to the same), and the court having examined said report finds said proceedings and sale in all respects regular and in accordance with law, and therefore approves and confirms the same, and approves the sureties offered, and order that said G. L. C., as such assignee, deliver said property to said E. K. upon their compliance with the terms of the said sale.

MISCELLANEOUS MATTERS
PROBATE COURT.

DUTIES AND RIGHTS OF SURVIVING PARTNERS.

(R. S. Secs. 3167—3170.)

No. 1593.

Entry appointing Appraisers for Partnership Property on Application of Partner.

[*Caption.*]

M. R., surviving partner of the late firm of M. R. & Co., having made application for the appointment of appraisers of the assets of said partnership, and it appearing that due notice thereof has been given to A. B., administrator of the estate of C. D., deceased, it is ordered that H. J., L. K., and N. O., three disinterested persons, be and they are hereby appointed appraisers and required to make out under oath a full and complete inventory and appraisement of the entire assets of said partnership (including real estate), together with a schedule of the debts and liabilities thereof, and that they forthwith file the same in this court.

R. S. Sec. 3167.

No. 1594.

Entry of Appointment of Appraisers on Application of Administrator.

[*Caption.*]

It appearing to the court that M. R., the surviving partner of the late firm of M. R. & Co., has neglected to make application to have an inventory and appraisement of the assets of said partnership, upon motion of A. B., administrator of the estate of C. D., deceased, H. J., L. K., and N. O. are appointed appraisers, and are required to make out on oath a full and complete inventory and appraisement of the entire assets of said partnership (including real estate), together with a schedule of the debts and liabilities thereof, and file the same forthwith herein.

R. S. Sec. 3168.

No. 1595.**Entry of Filing of Inventory.**

[*Caption.*]

This day came M. R., surviving partner of the firm of M. R. & Co. (*or*, A. B., administrator of the estate of C. D., deceased), and filed an inventory and appraisal of all the assets of the said partnership made in pursuance of a former order of this court, together with a statement of the debts and liabilities of said partnership, which the court finds upon careful examination to be correct, and approves the same.

No. 1596.**Entry when Partner Elects to take Assets.**

[*Caption.*]

This day came M. R., surviving partner of the late partnership of M. R. & Co., and made known to the court his election to take the interest of the deceased partner, C. D., deceased, at the appraised value thereof. And thereupon also came A. B., administrator of the deceased partner of said firm, C. D., deceased, and gave his consent thereto.

And the said M. R. having executed his promissory note for the sum of \$——, with interest payable in ——, which is the amount of the appraised value of said assets after deducting therefrom the debts and liabilities payable to the said A. B., administrator of the estate of C. D., deceased, with R. O. and J. E. as sureties, which the said M. R. offers to said administrator for the payment of the interest of the deceased partner, C. D., in the partnership, and also tenders a bond in the sum of \$——, with R. O. and J. E. as sureties, payable to said administrator, conditioned for the payment of the debts and liabilities of said firm and the performance of all actual obligations of said firm. The court being fully advised in the premises does approve said note and said bond, and also approves the taking of said partnership assets by said surviving partner, and does therefore authorize the said administrator to transfer to said M. R. the assets and property of said partnership.

R. S. Sec. 3169.

PROCEEDINGS IN RELATION TO JUSTICES OF THE PEACE.

No. 1597.

Entry ordering additional Justice to be Elected.

[*Caption.*]

Application having been made to this court by E. J. for an additional justice of the peace in — township, said county, and it appearing that public notice has been given in said township of the making of this application, and the court being satisfied that there is not sufficient number of justices in said township, and that it is expedient to add —, additional justice therein, it is ordered that —, additional justice, be elected and qualified in said township.

R. S. Sec. 568.

No. 1598.

Entry upon Intention to Contest being made known.

[*Caption.*]

This day came —, an elector (*or*, candidate) of the township of —, in said county, and made known to this court his intention to contest the election of J. H., who was declared elected justice of the peace in said township. It is therefore ordered that a citation issue to said J. H., notifying him that said — contests his election, and of the points relied upon by him, requiring him to appear herein on the — day of —, 18—, and that notice be given to the clerk of common pleas to withhold the return of such contested election until the same is decided.

R. S. Sec. 572.

No. 1599.

Entry appointing Freeholders to try Contest.

[Caption.]

[This may be made in connection with preceding entry.]

It is ordered that M. N., E. L., and J. W., three respectable freeholders of the county, not residing in — township, be and they are hereby appointed to try said contest, and that a summons be issued for them according to law.

R. S. Sec. 573.

No. 1600.

Entry of Decision.

[Caption.]

This day this cause came on to be heard upon the contest of the election of — as justice of the peace in — township, and the said M. N., E. L., and J. W., three freeholders of the county, summoned herein to try said contest, were duly sworn according to law, and said cause was heard upon the testimony, and was submitted to said jury. And thereupon said freeholders after due deliberation signed their decision and the same was duly attested by the court, which is as follows: [copy].

It is therefore ordered that a copy of said decision be transmitted to the trustees of said township (*or*, to the clerk of the court of common pleas).

R. S. Sec. 575.

PROCEEDINGS AGAINST MUNICIPAL OFFICERS.

No. 1601.

This day A. B., an elector of —, filed a complaint under oath, signed and approved by four other electors, charging that C. E., a member of the council [R. S. Sec. 1732] (with) [*specify charge*] has been guilty of (mal) misfeasance in office. It is ordered that a citation issue, requiring said C. E. to appear before this court on the — day of —, 18—.

R. S. Sec. 1732.

No. 1602.

Entry ordering Jury to be Impaneled.

[*Caption.*]

This day this cause coming on to be considered upon the complaint heretofore filed herein against C. E., who demanded a jury, it is therefore ordered that a venire be issued for a jury according to law, returnable —, 18—.

R. S. Sec. 1733.

No. 1603.

Jury Impaneled—Verdict of Acquittal.

[*Caption.*]

This day came the parties, this cause came on to be heard upon the complaint filed herein against C. E., and thereupon came the following named jurors: [*names*], who were duly impaneled and sworn according to law. And the jury having heard the evidence, arguments of counsel, and being instructed by the court, retired for consideration of their verdict; and said jury after due deliberation returned and delivered their verdict as follows: [*copy verdict*].*

It is therefore ordered by the court that said defendant be discharged.

R. S. Sec. 1736.

No. 1604.

Entry removing Officer found Guilty.

[*Caption.*]

[*Proceed from * in ante No. 1603.*]

It is therefore ordered that said C. E. be and he is hereby removed from the office of council [*or whatever it may be*], of the [*name of corporation*].

It is ordered that the said defendant pay the costs herein, taxed at \$——.

R. S. Sec. 1736.

APPROPRIATION OF PROPERTY BY MUNICIPAL CORPORATIONS.

(*R. S. Secs. 2232—2261.*)

No. 1605.

**Application to Assess Compensation filed by City Solicitor—
Ordering Notice and Time for Hearing.**

[*Caption.*]

This day came the plaintiff by P. J., city solicitor, and filed in this court its application to assess compensation for certain property therein described and owned by the persons therein named, and filed therewith a precept for summons and notice for the defendant.

Whereupon it is ordered that summons and notice issue to the sheriff of — county, Ohio, for the defendants, which is done. And the court fixes the — day of —, 18—, at — o'clock — M., as the day for hearing the preliminary questions herein, to which this proceeding is continued.

No. 1606.

Filing of Return of Notice.

[*Caption.*]

This day came J. R., sheriff of this county, and filed herein his return of the notice heretofore issued to him for the defendants in this case, with service endorsed thereon, and the same was by the court ordered recorded.

No. 1607.

Same continued—Entry ordering Impaneling of Jury.

[*Caption.*]

This cause came on to be heard upon the application of the city of C. to impanel a jury to assess the compensation to

be paid to the owners of the property sought to be appropriated herein and described in the application, and it appearing to the court that notice of the time and place of such application has been given to all the owners of such property in the ordinary manner of serving legal process five days previous to said application, and that said notice is reasonably specific and certain; and the court doth order and adjudge that a jury be impaneled on the — day of —, 18—, at — o'clock — M., to make inquiry into and assess the compensation to be paid for said property.

R. S. Sec. 223§. If the finding should be against the corporation on any jurisdictional question, a dismissal should follow.

No. 1608.

Same continued—Impaneling Jury—Order to View Premises.

[*Caption.*]

This day came the plaintiff by his attorney, and C. W., defendant, the other defendants failing to appear, and also came the following named persons, and were duly impaneled and sworn as jurors herein according to law: [*naming them*], and thereupon, on motion of the plaintiff's attorney, an order was issued to the sheriff to conduct the jury to view the premises sought to be appropriated forthwith in the presence of C. W., appointed on motion and agreement of counsel with plaintiff and defendant W. to show the jury said premises, returnable according to law.

R. S. Sec. 2242.

No. 1609.

Entry of Hearing—Judgment on Verdict.

[*Caption.*]

This cause came on to be heard upon the application of the city of — for the assessment of compensation to be paid the owners of the property described in the said application, and the court being satisfied that all the parties hereto have been duly served with process, thereupon came the following jury, who were duly impaneled and sworn, to wit: [*names of jurors*]. And the said jury having viewed the premises, heard the testimony, arguments of counsel, and charge of the court, retired for deliberation. And after due

deliberation said jury returned the following verdict: [*copy verdict*]. [*If a motion for new trial should be made, it should be noted and disposed of before the following is made.*]

And the court having examined the proceedings, and being satisfied that the same are in all respects regular, does hereby approve the said verdict.

It is further ordered that the said corporation pay within — days the amount of compensation so assessed for the use of the following named persons: [*names*].

And it is further ordered that upon payment by said corporation of the said several amounts so allotted by the jury to the said owners, or into court, that the said corporation shall be entitled to all the interests and estate of said persons in and to said real estate, and that an order issue to the sheriff of said county to put said corporation into possession thereof.

It is further ordered that the said corporation pay the costs herein, taxed at \$——.

No. 1610.

Same continued—Entry upon Verdict decreeing Appropriation of Property.

[*Caption.*]

This day this cause came on for trial, and the same having been submitted to the jury upon the pleadings and testimony, and the jury having assessed the amount of compensation and damages in this case to be paid to the owners of the premises described in the application by reason of the appropriation of the same to the order of the plaintiff as follows, to wit: To C. W., owner of the first parcel, for land taken, the sum of \$——; damages to residue, \$——; and for the value of building standing upon said first parcel, the sum of \$——; to C. B., owner of the second parcel, for land taken, the sum of \$—— (*and so on*).

It is now, therefore, adjudged and decreed that said verdict be confirmed, and that said plaintiff upon the payment of said amount of verdict into this court for the several defendants, as herein found due them, and all of costs due from it, shall be entitled to take possession of and hold the premises aforesaid with all rights and interests thereunto belonging and appertaining, for the uses and purposes for which the appropriation was made, and all necessary process to put plaintiff into possession of the same is thereupon awarded.

No. 1611.

**Same continued—Judgment in Court of Common Pleas upon
Appeal fixing Compensation.***[Caption.]*

This cause came on for trial, and a jury having been waived, was submitted to the court upon the pleadings and testimony, and upon consideration thereof the court assessed the amount of compensation and damages to be paid to M. D., the owner of — parcel of land described in the application, by reason of the appropriation of the same to the use of the plaintiff at the sum of \$——.

It is therefore ordered, adjudged, and decreed that said M. D. recover from the plaintiff as compensation for the land taken and damages to the residue by reason of the appropriation as aforesaid the sum of \$——, and upon the payment by the plaintiff of the amount of said verdict into court, and all the costs due from it, it shall be entitled to take possession of and hold the premises aforesaid, with all right, title, and interest thereunto belonging and appertaining, for the uses and purposes for which the appropriation was made, and all necessary process to put the plaintiff into possession of the same is ordered.

APPROPRIATION OF PROPERTY BY PRIVATE CORPORATION.

(*R. S. Secs. 6414—6453.*)

No. 1612.

Petition filed by Corporation and Set for Hearing.*[Caption.]*

This day came the plaintiff and files herein its petition, duly verified, to appropriate the property therein described, and this cause is set for hearing on the — day of —, 18—.

R. S. Secs. 6416, 6418.

No. 1613.**Entry upon Filing of Petition to Compel Corporation to make Appropriation.**

[*Caption.*]

This day came L. P. and presented his petition against the V. R. Co., a corporation organized under the laws of Ohio, defendant, praying for such process and proceedings as are authorized by law to compel the said defendant to appropriate certain property and property rights alleged to be owned by said plaintiff, and said to be used and occupied by said defendant. And the same being duly verified by the oath of said plaintiff is placed on file. And it is ordered that the preliminary hearing of said petition be had in this court on the — day of —, instant, at — o'clock forenoon, and our writ of summons is thereupon accordingly issued for said defendant, directed to the sheriff of said county, returnable according to law.

No. 1614.**Entry settling the Preliminary Questions.**

[*Caption.*]

This day this cause came on to be heard upon the pleadings, evidence, and arguments of counsel, and was submitted to the court. Upon careful consideration whereof the court finds that service of process has been duly and legally made upon the defendants; that the plaintiff herein is a corporation duly organized under the laws of Ohio, and that said plaintiff corporation has a legal right to make the appropriation which they ask in their petition, which the court finds to be necessary, and that the said plaintiff and the said defendants are unable to agree upon the compensation to be paid by plaintiffs to defendants for the land sought to be taken.

It is therefore ordered that a jury be impaneled according to law to assess the compensation to be paid by plaintiff to defendants for the land sought to be taken, and that said jury be required to appear in this court on the — day of —, 18—, at — o'clock — M.

R. S. Secs. 6420, 6421.

No. 1615.**Filing of Petition by Owner against Corporation after having served Notice to institute Proceedings.**

[*Caption.*]

And now this day came the plaintiff and filed his petition against said railroad company, praying for proceeding in appropriation and condemnation of land, and for judgment against said railroad company in the sum of \$—— for land taken and damaged. It is therefore ordered that this matter be for hearing on the — day of —, 18—, at — o'clock — M., and that summons issue according to law.

Whittaker's Probate Code, Sec. 6448.

No. 1616.**Entry of Hearing when Company failed to institute Proceedings—Ordering Impaneling of Jury.**

[*Caption.*]

And now this day came the plaintiff by L. C. J. and E. B. T., his attorneys, and the defendant by J. M. S., Esq., its attorney, and this case coming on for hearing, and being submitted to the court upon the evidence produced, the court find that the defendant has been properly served with process, and is properly before the court; that due and legal notice was given by the plaintiff to the said defendant company to proceed to appropriate said lands, and that said company has failed to institute such proceedings; and the court do further find that the defendant, said P. & W. R. Co., is a corporation as averred in the petition herein; that it has a legal right to make the appropriation prayed for in the petition, and that the same is necessary, and that plaintiff is unable to agree with the defendant as to the compensation to be paid for the property and rights to be appropriated herein. It is therefore ordered that to assess compensation for said property herein sought to be appropriated a jury be impaneled according to law, and that said jury come on the — day of —, A. D. 18—, at — o'clock — M., which time is hereby fixed for the impaneling of the same.

No. 1617.

Impaneling Jury—Adding new Party—Jury ordered to View.[*Caption.*]

And now this day came the parties and their said attorneys, and this cause came on to be heard, and it being represented that the P. P. & F. R. Co. is a necessary party defendant in this proceeding, on motion made by its attorney said P. P. & F. R. Co. is granted leave to become party defendant in this action and file answer instanter. And now came the following named jurors heretofore summoned, viz.: [*name the jurors*], and the panel being complete, and each juror being interrogated as to whether he was in any way interested, either as owner, or agent, or otherwise, in the property sought to be condemned and appropriated, and each answering in the negative, and neither party excepting thereto, the said jurors were duly sworn, and on motion of both parties a writ was issued to the sheriff for a view by the jurors, in the presence of L. C. J. for the plaintiff, and J. M. S. for the defendant, of the premises sought to be appropriated, returnable according to law — —, 18—, at — o'clock — M., to which time this cause is now adjourned.

No. 1618.

Entry of Daily Hearing.(*Caption.*)

And now this day came the parties, and with their attorneys, and also the jury heretofore impaneled and sworn in this case, and the trial of this case proceeds, and the same not having been completed at the hour of adjournment, the further trial of said case is adjourned to — —.

No. 1619.

Entry when Plaintiff rests—Motion made to Dismiss for Want of Jurisdiction—Overruled—Trial Proceeds.[*Caption.*]

And now this day came the parties, and with their attorneys, and also the jury heretofore impaneled and sworn in the case of said plaintiff against said P. & W. R. Co., and the trial of this case proceeds, and the plaintiff having rested

his case, thereupon the defendant by its attorneys moved the court to dismiss this cause upon the ground that this court has no jurisdiction of said cause, which motion being heard and understood is by the court overruled, to which ruling the defendant excepted, and the same not having been completed at the hour of adjournment, the further trial of said case is adjourned to — —, at — o'clock — M.

No. 1620.

Return of Verdict—Notice of Motion for New Trial.

[*Caption.*]

And now this day again came the parties hereto, and their attorneys, also the jury heretofore impaneled and sworn, and the trial proceeds, and upon his own motion the plaintiff has leave to withdraw the amendment to his petition heretofore filed herein, which is done, and thereupon after hearing the testimony of witnesses, arguments of counsel, and charge of the court, said charge having been reduced to writing at the request of and for the defendant, the jury after due deliberation return their verdict in writing to the court as follows, to wit:

[*Title.*]

We, the jurors in this case, having inspected the premises of the said J. P., and having heard the testimony offered by the parties, and the arguments of counsel, do award and determine that the said J. B. P. be paid the sum of \$—— as compensation for the land belonging to him which is appropriated to the use of the P. & W. R. Co., without deduction for benefit to any property of the said J. B. P., derived or to be derived by the location of said road. And we do also find and determine that the premises of the said J. B. P., from which said appropriation is taken, will be rendered less valuable by the location of said road the sum of \$——.

A. T., Foreman.

And thereupon the defendant by its attorney gave notice of its intention to file a motion for a new trial.

No. 1621.

Entry overruling Motion for New Trial, and Judgment.

[*Caption.*]

And now this day came the parties and by their attorneys, and this cause came on to be heard upon the motion of the

defendant for a new trial hereinbefore filed in this cause, and was argued by counsel, on consideration whereof the court do find that said motion is not well taken, and the same is hereby overruled, to which decision of the court in overruling said motion the defendant excepted, and its exceptions are entered of record, and thereupon the court proceeded to enter judgment upon said verdict as required by law, and the jury herein having assessed the amount of compensation in this case to be paid to the owner of the premises described in the petition by reason of the appropriation of the same to the use of the said defendant, said P. & W. R. R. Co., at \$——, it is now adjudged that said verdict be and the same is confirmed; and it is further considered by the court that the plaintiff herein recover of the said P. & W. R. R. Co. the sum of \$—— and his costs herein, to be taxed, and execution is awarded therefor. To the rendering of judgment herein against defendant herein defendant then and there excepted, and thereupon defendant presented to the court its bill of exceptions, which is allowed, signed, sealed, and made a part of the record in this case.

APPEALS IN ROAD CASES.

No. 1622.

**Transcript of Record from County Commissioners filed and
Day set for Hearing in Probate Court.**

[*Caption.*]

This day came A. B., the appellant, and filed herein a transcript of the proceedings had before the county commissioners of this county, duly certified as required by law, showing all the proceedings had before the said county commissioners in the matter of the petition of A. B. and others for the establishment of a county road, and also all the original papers therein.

It is ordered that said cause be set for hearing on the — day of —, 18—, at — o'clock — M.

NOTE.—The hearing must not be later than the twentieth day after docketing the appeal. R. S. Sec. 4690.

No. 1623.

Entry affirming Proceedings before County Commissioners.

[Caption.]

This day this cause came on to be heard upon the transcript and original papers in the matter of the appeal from the county commissioners in the establishment of a county road petitioned for by the said appellant herein; and the court having heard the arguments of counsel and carefully examined the original papers and the transcript from the county commissioners, and being fully advised in the premises, and no exception having been taken by any claimant to the assessment of compensation and damages returned to and approved by the county commissioners,* and the court finding that the proceedings previous to this appeal have been had in all respects regular and legal, said proceedings are hereby approved and confirmed, and it is ordered that said appellant pay the costs of this appeal herein, taxed at \$——.

R. S. Sec. 4691.

No. 1624.

Entry reversing Proceedings.

[Caption.]

[Continuing from * in ante No. 1623.]

The court finds that said proceedings have not been in all respects regular and legal, that they are erroneous in the following particulars, to wit: [*state error*], and the same are hereby reversed and set aside.

It is therefore considered and ordered by the court that C. D., E. F., and G. H., three judicious and disinterested freeholders of the county, be and they are hereby appointed, together with the surveyor of the county, to view said premises as required by law, and that they meet at [*name place*] on the — day of —, at — o'clock — M., and after being first duly sworn that they proceed to view and survey said road according to law, and that they make report to this court of their proceedings on or before the — day of —, 18—.

R. S. Sec. 4691.

No. 1625.**Entry approving Report of Viewers.**

[*Caption.*]

This cause coming on this day to be heard upon the report of the viewers heretofore filed herein, and the court having made a careful examination of said report, and having heard the arguments of counsel, and being fully advised in the premises, finds that said report and the proceedings of said viewers are in all respects regular and in conformity to law; and the court further finding that the said proceedings and report of said viewers* substantially coincides with the order of the county commissioners appealed from, the same are hereby approved and confirmed. It is therefore ordered that the said — pay the costs of this appeal, taxed at \$——.

R. S. Sec. 4693.

No. 1626.**Entry where Report of Viewers on Appeal materially Varies from Order Appealed from, etc.**

[*Caption.*]

[*Proceeding from * in ante No. 1625*] is favorable to the petitioners, and materially varies from the order appealed from, but is substantially legal and is within the scope of the petition, the same is hereby approved and confirmed.

It is therefore ordered that the appellants pay the costs herein, taxed at \$——.

R. S. Sec. 4693.

No. 1627.**Entry ordering Review of Road when Report of Viewers is Adverse to Establishment of Road.**

[*Caption.*]

This day this cause coming on to be heard upon the report of the viewers heretofore filed herein, and it appearing therefrom that the same is against the establishment of said road, and twelve of the petitioners having filed their motion asking for a review of said road as provided by law, and the court being satisfied that the request of said motion is reasonable and proper, it is by the court ordered that —, —, —,

—, and —, five disinterested freeholders of the county, be and they are hereby appointed a committee to review said road; and said reviewers are hereby ordered to examine the proposed road as defined and referred to in the order appealed from, and report in writing their opinion for or against the same, together with their reasons, to this court on or before the — day of —, 18—.

R. S. Sec. 4694.

No. 1628.

Entry upon Report of Reviewers.

[*Caption.*]

This day this cause coming on to be heard upon the report of the reviewers heretofore appointed herein, and it appearing therefrom that said report is adverse to the establishment of said road, it is by the court ordered and adjudged that no further proceedings be had herein upon the petition of the petitioners, and that the said petitioners pay the costs herein expended, taxed at \$—.

R. S. Sec. 4694.

No. 1629.

**Entry on Appeal from Final Decision from Township Trustees
—Ordering Jury Impaneled and Day for Hearing.**

[*Caption.*]

This day came — and filed herein a duly certified transcript, showing all proceedings had before the township trustees of — township, in this county, in the matter of the petition of — for the establishment of a road, and it appearing that said appellants have entered into a bond according to law, it is ordered that a venire issue, directing that a jury be selected according to law, requiring them to appear in this court on the — day of —, 18—.

R. S. Secs. 4697, 4700.

No. 1630.

**Same Continued—Jury Impaneled and Ordered to View
Premises.**

[*Caption.*]

This day this cause coming on to be heard, and thereupon also came the following named jurors: [*naming them*], who

were duly impaneled and sworn according to law. And thereupon, upon motion of the appellants herein, it is ordered that the jury in charge of the sheriff proceed to examine the road as established or ordered, and the property of the several claimants (appellants) taken therefor, and when they have so made such examination that they then return into this court on the — day of —.

R. S. Sec. 4703. Some one other than the sheriff may be appointed to show the jury the premises.

No. 1631.

Entry upon Return of Jury, and of Hearing and Verdict.

[*Caption.*]

This day came the parties hereto by their attorneys, and also came the jury heretofore impaneled and sworn, and having made an examination of the premises through which the road proposed will pass by order of this court, the trial thereupon proceeded.

And the jury having heard the evidence, the arguments of counsel, and the instructions by the court, delivered their verdict into court as follows:

[*Copy verdict.*]*

And the said jury by their verdict having awarded the said appellants a sum greater than that awarded by the township trustees, it is ordered and adjudged that the state of Ohio recover from the defendants [*names*] the sum of \$——, being the amount of the costs of this appeal, and that said verdict of the jury be entered upon the record of this court as provided by law. (Sec. 4703.) And no motion for a new trial having been made, it is ordered that a transcript be sent to the township trustees of — township, and that all of the original papers be returned to said trustees.

R. S. Sec. 4707.

No. 1632.

Same continued—Entry when Motion for New Trial is Made— Judgment thereon.

[*Caption.*]

[*Proceeding from * in ante No. 1631.*] And thereupon came the defendants and filed a motion for a new trial, and the court having heard the arguments of counsel thereon, and

being fully advised in the premises, finds that said motion is not well taken, and does therefore overrule the same.

It is therefore ordered by the court that said verdict of the jury be entered upon the record of this court, and that all of the original papers received from the township trustees, together with a duly certified transcript of the record of this cause in this court, be transmitted to the said trustees of — township as provided by law.

And it appearing from said verdict that the award made by said jury is not greater than that made by the said trustees, it is considered by the court that the state of Ohio do recover from the defendants the costs of this appeal, taxed at \$——.

R. S. Secs. 4706, 4703, 4707.

ONE MILE ASSESSMENT PIKE.

(R. S. Secs. 4782—4784.)

No. 1633.

Entry appointing Appraisers to assess Value of Material and Damages for Removal through Premises.

[*Caption.*]

This day came the county commissioners of this county and filed herein their application for the appointment of appraisers to assess the value of material which they are authorized to procure for the construction and repair of — pike, representing that they can not agree with —, owner, as to the price which should be paid for said materials, it is by the court ordered that A. B., C. D., and E. F., three disinterested freeholders of the county, be and they are hereby appointed to assess the value of the materials set forth in said application filed herein, and also any damages which may accrue to the owner of such materials by the removal thereof through his premises; it is also further ordered that said appraisers, after being first duly sworn to impartially assess the value of said materials, do enter upon the premises of the owner of said materials and assess the value thereof, as well as any damages which may accrue to the owner by the removal of

the same through his premises, and that they return their said award into this court within ten days herefrom.

NOTE.—The statute—Secs. 4782, 4783—does not require that notice shall be given to the owner of the filing of the application, but seems to contemplate that the appointment may be made at once, although it may be the better practice to first give the notice before the appraisers are appointed. Forms will answer for two mile assessments under 4859.

No. 1634.

Entry on Return of Award.

[*Caption.*]

This day came the appraisers heretofore appointed to assess the value of the materials which the commissioners are authorized to procure for the construction and repair of — pike, and any damages accruing to the premises of the owner thereof. And the court having carefully examined said award so made, and finding the same in all respects regular and correct, does approve and confirm the same. It is therefore ordered by the court that the said county commissioners do pay or secure to be paid to the said — the said sum of \$—, the value so assessed by the said appraisers, and the further sum of \$—, the damages so assessed to said —, and that they pay the costs herein, taxed at \$—.

ABANDONMENT OF ROADS.

(*R. S. Secs. 4915—4917.*)

No. 1635.

Petition Filed and Set for Hearing.

[*Adversary Form.*]

This day came [*naming them*], twelve freeholders of this county through which — turnpike has been constructed, and filed herein their petition, alleging therein that said road and parts thereof has not been kept in repair for the six months next preceding the filing of their said petition, and asking that the same may be declared abandoned and vacated.

It is thereupon ordered by the court that the said petition

be set for hearing on the — day of —, 18—, at — o'clock — M., and that a written notice be given to the defendants of the filing of said petition and of the time set for the hearing thereof according to law.*

R. S. Sec. 4915.

No. 1636.

Entry ordering Notice by Publication on Non-Resident.

[*Caption.*]

[*Proceeding from * in last Form.*] And it being made to appear to the court by the affidavit of A. D. that one — is a non-resident of the state, it is by the court further ordered that said petitioners give notice to such person by publication for three consecutive weeks in some newspaper printed and of general circulation in this county, according to law.

No. 1637.

Entry on Final Hearing.

[*Caption.*]

This day this cause came on to be heard upon the petition heretofore filed herein for the abandonment of — turnpike, and it appearing that due and legal notice has been given all of the defendants hereof, and the court having heard all the evidence adduced by the parties, and being fully advised in the premises, finds that the facts stated in said petition are true, and that said road has been out of repair for a period of six months next preceding the filing of this petition. It is therefore considered by the court that the said road be and the same is hereby declared abandoned and vacated.

R. S. Sec. 4916.

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